

Missouri Attorney General's Opinions - 1988

Opinion	Date	Topic	Summary
4-88	Jan 19		Opinion letter to The Honorable Bob Feigenbaum
7-88	Aug 4		Opinion letter to Michael Reagen, Ph.D.
11-88	Dec 22		Opinion letter to Frank V. DiMaggio
14-88	Feb 25	COUNTIES. COUNTY ROADS. COUNTY SALES TAX. ROADS. ROAD DISTRICTS. TAXATION-COUNTY SALES TAX.	A county is authorized to expend a portion of its sales tax revenue derived from the tax authorized by Section 67.700, RSMo 1986, for maintenance of roads in special road districts, which roads are not state highways and which roads form a part of the county network of roads, either directly or by means of a contract with the special road district which contract complies with the provisions of Article VI, Section 16, Missouri Constitution of 1945, and Sections 70.210 to 70.320, RSMo 1986.
19-88	June 15		Opinion letter to C. Keith Schafer, Ed.D.
21-88	Mar 2	CAMPAIGN EXPENDITURES. CAMPAIGN FINANCE REVIEW BOARD. SCHOOLS. SCHOOL DISTRICTS.	While a school district is not a 'committee' as that term is defined in Section 130.011(7), RSMo 1986, it is a 'person' as that term is defined in Section 130.011(18), RSMo 1986, and is subject to certain disclosure requirements in the Campaign Finance Disclosure Law.
22-88	July 27	COUNTIES. COUNTY COMMISSIONS. COUNTY COMMISSIONERS. COUNTY COURTHOUSE.	(1) A decision by the county commission to close the courthouse would be beyond its authority and thus void; however, the commission is not prohibited from reducing the number of hours each day the courthouse is open to the public, and (2) the county commission's failure to pay elected officials does not alleviate or affect the county's obligation to pay them.
23-88	Aug 3		Opinion letter to Martin Mazzei
25-88	Feb 11	AMBULANCE DISTRICTS. CONFLICT OF INTEREST. COUNTIES. COUNTY COMMISSIONS. COUNTY	The same person may not simultaneously hold the office of presiding commissioner of the county commission and the office of member of the board of directors of an ambulance district within that county.

		COMMISSIONERS. INCOMPATIBILITY OF OFFICES.	
26-88	June 7	AMBULANCE DISTRICTS. CONSTITUTION. CONSTITUTIONAL LAW. INVESTMENTS.	An ambulance district may not invest in mutual fund accounts.
27-88	July 27	CITIES, TOWNS AND VILLAGES. LICENSE FEES. LICENSE TAX. LICENSES. THIRD CLASS CITIES.	A city of the third class is not authorized to levy and collect a license tax on electricians, and a city of the third class is not authorized to regulate the business of electricians by requiring electricians to first obtain a license, the issuance of which is conditioned on the electrician satisfactorily passing a proficiency exam.
29-88	Apr 26	BAIL BONDS. BONDS. CIRCUIT COURTS. UNCLAIMED PROPERTY. UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT.	Money deposited as a cash bond during the course of legal proceedings is “intangible personal property” within the meaning of Section 447.532, RSMo 1986, and will become abandoned property subject to the provisions of Sections 447.500 through 447.585, RSMo 1986, if such money remains unclaimed for more than seven (7) years after the depositor became entitled to reclaim such money by reason of the fulfillment of the condition of the bond.
30-88	Aug 4	PUBLIC RECORDS. RECORDS. SETTLEMENT OF CLAIMS. STATE AUDITOR. SUNSHINE LAW.	Settlement agreements entered into by public governmental bodies prior to September 28, 1987 as a final disposition to a legal action could have been closed and may remain closed subsequent to September 28, 1987, which is the effective date of the revised Sunshine Law; however, settlement agreements entered into subsequent to September 28, 1987 are to be made public at the conclusion of the litigation pursuant to Section 610.021(1), RSMo Supp. 1987.
31-88	Feb 4		Opinion letter to Frederick A. Brunner
32-88	May 31	ECONOMIC DEVELOPMENT, DEPARTMENT OF. COSMETOLOGY, BOARD OF.	The Board of Cosmetology has the authority to issue a shop license to an individual renting space within a licensed cosmetology shop, which license is sometimes referred to as a booth rental license.
35-88	July 27	STATE FIRE MARSHAL.	1. The state fire marshal has the authority to send an arson investigator to investigate a fire or to assist a fire district or

		FIRE PROTECTION - FIRE PROTECTION DISTRICTS.	department. 2. The fire chief of a district or department can request assistance from either the state fire marshal or local authorities in investigating a fire but cannot exclude any appropriate authority-either the fire marshal or local authorities with jurisdiction-from assisting/investigating if they so desire.
36-88	Apr 18		Opinion letter to Stanley M. Thompson
38-88	Jan 21		Opinion letter to The Honorable Jan Martinette
41-88	Feb 4		Opinion letter to The Honorable Ron Auer
42-88			Withdrawn
45-88	Mar 14	GROUP INSURANCE. HEALTH INSURANCE. INSURANCE. SCHOOL DISTRICTS. SCHOOLS.	Under Section 169.590, RSMo Supp. 1987, (1) a school district which provides group health insurance for its employees must offer the former employees who have retired and surviving spouses and surviving children of those former employees coverage under the school district's group policy at premiums equal to that charged for other members of the group, and (2) the retirees, their surviving spouses and their surviving children must pay the premium for such coverage and the school district cannot provide such health insurance coverage at no charge to those persons.
46-88	Aug 9		Opinion letter to The Honorable Delbert L. Scott
47-88	Jan 19	COUNTIES. COUNTY FUNDS. COUNTY HOSPITAL.	Section 205.210, RSMo 1986, prohibits Jackson County from appropriating money from its general revenue for county hospital purposes.
48-88	Mar 9	ECONOMIC DEVELOPMENT, DEPARTMENT OF. EMPLOYMENT. PROFESSIONAL REGISTRATION, DIVISION OF. PUBLIC RECORDS. RECORDS. SUNSHINE LAW.	(1) When a vote is taken by a state licensing board to close an investigation prior to the filing of a complaint with the Administrative Hearing Commission and the vote is taken in a meeting closed pursuant to Section 610.021(14), RSMo Supp. 1987, there is no requirement that the vote to close the investigation be made public, (2) when a vote is taken by a state licensing board in a meeting closed under Section 610.021(1), RSMo Supp. 1987, to accept a settlement proposal or compromise a matter in litigation, including a matter before the Administrative Hearing Commission, and that vote finally disposes of the matter, all votes relating to that litigation taken after September 28, 1987, shall be made public, and (3) when state licensing boards use consultants to investigate complaints, such consultants are not employees as that term is used in Section 610.021(3), RSMo Supp.

			1987.
50-88	Apr 18	DEPARTMENT OF HIGHWAYS AND TRANSPORTATION. DEPARTMENT OF PUBLIC SAFETY. GIFTS. HIGHWAY PATROL.	The written permission referred to in the second sentence of Section 43.060.2, RSMo 1986, is the written permission of the Director of the Department of Public Safety, rather than the Missouri State Highways and Transportation Commission.
51-88	Jan 29		Opinion letter to The Honorable Joseph R. Ortwerth
52-88	Mar 31		Opinion letter to The Honorable William E. Lewis
53-88	July 27	DRIVING WHILE INTOXICATED. JURISDICTION. JUVENILES. FINGERPRINTING. TRAFFIC OFFENSES. PHOTOGRAPHING ARRESTED PERSONS.	Law enforcement officials may fingerprint and photograph a sixteen-year-old charged with a first offense of driving while intoxicated under Section 577.010, RSMo 1986, or an equivalent municipal ordinance, without authorization to do so by the juvenile judge, because the offense of driving while intoxicated, first offense, is not a felony, and is not within the jurisdiction of the juvenile court.
54-88	Jan 29	CITY RECORDS. COUNTY RECORDS. REAL ESTATE ASSESSMENTS. REAL ESTATE TRANSFERS. RECORDS. SUNSHINE LAW.	A certificate of value required to be filed by a city or county ordinance is a public record under the Sunshine Law and is open to the public for inspection and copying.
59-88	Aug 3		Opinion letter to The Honorable Pat Danner
66-88	June 7	AMBULANCE DISTRICTS. CANDIDACY FILINGS. CANDIDATES. COUNTY CLERK. ELECTIONS.	Pursuant to Section 190.050, RSMo 1986, a candidate for election to the initial or subsequent board of directors of an ambulance district should file his declaration of candidacy with the county clerk.
67-88	Nov 21		Opinion letter to The Honorable Fred B. Brummel
68-88	Jan 29	CHARITABLE CORPORATIONS. CHARITIES. FRATERNAL BENEFIT SOCIETIES.	Organizations such as the American Legion, Elks Lodge and others which have tax exemptions recognized by the Internal Revenue Service under Section 501(c)(7) or Section 501(c)(8) and solicit funds for 'charitable purposes' by way of commonly used fund-raising methods are subject to the registration requirements of Sections 407.450 to

			407.478, RSMo 1986, unless the solicitation of funds is limited to the membership of the organization itself.
69-88	Jan 13		Opinion letter to Roy D. Blunt
70-88	Feb 8		Opinion letter to Jeremiah W. (Jay) Nixon
71-88	Jan 21		Opinion letter to Roy D. Blunt
74-88	July 13	FIRE PROTECTION DISTRICTS. PROPERTY TAX. TAX RATE ROLLBACK.	Section 321.244, RSMo 1986, relating to voter-approved property tax increases for fire protection districts, excepts fire protection districts from the provisions of Section 137.073.5(2)(a) and (b), RSMo 1986.
78-88	Mar 31		Opinion letter to Charles E. Kruse
79-88	Mar 14	METROPOLITAN ZOOLOGICAL PART AND MUSEUM DISTRICT. REASSESSMENT. TAXATION-PROPERTY. TAXATION-RATE. TAX RATE ROLLBACK.	(1) The property tax rate ceiling in 1989 for the Missouri History Museum Subdistrict of the Metropolitan Zoological Park and Museum District is based on the maximum authorized property tax rate in 1988 rather than the property tax rate actually levied in 1988, and (2) if the property tax rate levied for such subdistrict in 1989 is less than the 1989 tax rate ceiling, assuming no changes in its tax rate ceiling between 1989 and 1990, the tax rate may be raised in 1990 to the tax rate ceiling without voter approval.
80-88	June 7		Opinion letter to Carl M. Koupal, Jr.
83-88	Oct 13		Opinion letter to The Honorable Danny Staples
85-88	May 31	DEPARTMENT OF PUBLIC SAFETY. FIRE MARSHAL.	Pursuant to Section 320.230.2, RSMo 1986, the fire marshal, his assistants and investigators who have completed 240 hours of basic police training are peace officers with general police powers when investigating fire-related offenses. They are also considered peace officers when assaulted while engaged in the performance of their duties.
87-88	Mar 21	CITY ELECTIONS. COUNTY ELECTIONS. ELECTION COMMISSIONERS, BOARD OF. ELECTION EXPENSE AND EXPENDITURES. ELECTIONS.	The Clay County Board of Election Commissioners has the authority to enter into a contract for the service and maintenance of voting machines and has the authority to enter into a contract to upgrade its computer equipment, the Board need not comply with any purchasing procedures applicable to county purchases or to city purchases, and both the city and county are liable for their proportionate share of the costs as provided in Section 115.073.1, RSMo 1986.
89-88	Apr 26	ABANDONMENT OF PROPERTY. CONSTITUTION.	The disposition of abandoned property delivered to the state pursuant to Missouri's Uniform Disposition of Unclaimed Property Act, Sections 447.500 through 447.585, RSMo 1986, is governed by the provisions of

		ESCHEATS. UNCLAIMED PROPERTY. UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT.	that Act, and is not subject to the provisions of Article IX, Section 5 of the Missouri Constitution.
91-88	July 13		Opinion letter to The Honorable Robert T. Johnson
92-88	June 16	MILITARY LEAVE. MISSOURI NATIONAL GUARD. NATIONAL GUARD.	An agency, in calculating the amount of military leave to which a state employee is entitled, pursuant to Section 105.270.1, RSMo 1986, should include all days from the time of the employee's departure until the time of his or her return, regardless of whether or not the employee was scheduled to work on all interim days or not, for a total of fifteen calendar days.
93-88	Mar 14		Opinion letter to The Honorable Michael P. David
95-88	May 4	MENTAL HEALTH, DEPARTMENT OF. STATE CONTRACTS.	The Department of Mental Health may not contract out the operation of a state-owned residential facility for the mentally ill to a private not-for-profit entity.
98-88	May 4		Opinion letter to The Honorable Chuck Surface
100-88	Dec 22	COMPENSATION. COUNTIES. PUBLIC ADMINISTRATOR.	The Public Administrator appointed for Buchanan County on June 19, 1987 is to be paid for 1987 a pro-rata portion of the four thousand dollars (\$4,000.00) authorized by Section 473.739, RSMo 1986, based on the time served in office.
101-88	Apr 18	JUNIOR COLLEGE DISTRICTS. JUNIOR COLLEGES.	A candidate for trustee of East Central College is not required by Section 178.820.5, RSMo 1986, to have been a voter of his or her particular subdistrict for at least one whole year next preceding the election.
102-88	Aug 3	GROUP INSURANCE. HEALTH INSURANCE. INSURANCE. JUNIOR COLLEGE DISTRICTS. SCHOOL DISTRICTS. SCHOOLS.	The provisions of Section 169.590, RSMo Supp. 1987, are not applicable to junior college districts.
103-88	Aug 3	SCHOOLS. SCHOOL BOARD ASSOCIATION DUES. SCHOOL BOARDS. SUNSHINE LAW.	The Missouri School Boards' Association is a "quasi-public governmental body" as defined in Section 610.010(2), RSMo Supp. 1988 , and subject to the provisions of Chapter 610, RSMo, the Sunshine Law.

104-88	Apr 18	CONTINUING EDUCATION. ECONOMIC DEVELOPMENT, DEPARTMENT OF. HEALING ARTS, BOARD OF. PHYSICIANS.	The State Board of Registration for the Healing Arts may, pursuant to Section 334.075, RSMo Supp. 1987, require continuing education for physicians to be completed over a time period in excess of one year.
106-88	Apr 7		Opinion letter to The Honorable Frank Bild
111-88	May 18	CANDIDATES. COUNTY COMMITTEE. ELECTIONS. ELIGIBILITY OF CANDIDATE. QUALIFICATIONS OF CANDIDATE.	Pursuant to Section 115.607.1, RSMo 1986, a candidate for county committee who was not a registered voter for one year prior to the date of the election because said candidate had not attained the age of eighteen years one year prior to the date of the election is not a qualified candidate, and the election authority has the authority to withhold said candidate's name from the primary ballot.
113-88	June 30		Opinion letter to Richard Rice
121-88	June 7	CITIES, TOWNS AND VILLAGES. CITY OFFICERS-OFFICIALS. CONFLICT OF INTEREST. COUNTIES. COUNTY COMMISSIONS. COUNTY COMMISSIONERS. INCOMPATIBILITY OF OFFICES.	The same person may not simultaneously hold both the office of presiding commissioner of a third class county and the office of alderman of a fourth class city within that county.
124-88	May 16		Opinion letter to Roy D. Blunt
128-88	May 20		Opinion letter to Roy D. Blunt
130-88	May 20		Opinion letter to Roy D. Blunt
131-88	May 24		Opinion letter to Roy D. Blunt
134-88	Oct 21	COUNTIES. DISSOLUTION OF SPECIAL ROAD	The special road districts created in 1919 in Ripley County, a non-township county, pursuant to Section 10464 of Chapter 102, RSMo 1909, are subject to the dissolution procedure set forth in Section

		DISTRICTS. ROAD DISTRICTS. SPECIAL ROAD DISTRICTS.	233.295, RSMo 1986, or, if the alternative form of county highway commission is adopted pursuant to Section 230.210, RSMo 1986, the special road districts are abolished under Section 230.225, RSMo 1986.
138-88	Sept 27	CRIMES AND PUNISHMENT. CRIMINAL LAW.	Lethal injection may be used to carry out the execution of those sentenced to death prior to the effective date of Section 546.720 as enacted by Conference Committee Substitute for Senate Committee Substitute for House Committee Substitute for House Bills Nos. 1340 & 1348, 84th General Assembly, Second Regular Session (1988).
139-88	Nov 10	COUNTIES. COUNTY OFFICERS. COUNTY OFFICIALS. COMPENSATION. EFFECTIVE DATE OF LAW.	Any increased compensation adopted by a county salary commission for the year 1988 pursuant to Conference Committee Substitute for House Committee Substitute for Senate Committee Substitute for Senate Bill No. 431, 84th General Assembly, Second Regular Session (1988) is effective from the date it is adopted by the county salary commission.
144-88	Sept 12	ECONOMIC DEVELOPMENT, DEPARTMENT OF. FINANCE, DIVISION OF.	Section 367.140, RSMo 1986 requires the Director of Finance to issue a certificate of registration to an applicant when the applicant has complied with the statutory conditions.
146-88	Dec 22	EDUCATIONAL FUNDS. EDUCATIONAL TELEVISION. SCHOOLS. SCHOOL FUNDS. TUITION.	Fees charged by educational entities to provide coursework for high school credit, delivered to students via interactive satellite communication systems, must be paid from either the free textbook fund or the incidental fund.
149-88	Nov 10		Opinion letter to Briney Welborn
164-88	Nov 21	COUNTIES. COUNTY JAIL. COUNTY SALES TAX. TAXATION-COUNTY SALES TAX.	All funds received by a county from a sales tax imposed pursuant to Section 67.700, RSMo 1986, for the purpose of the construction of a county jail and sheriff's facility, and any interest earned upon the investment of such funds, must be expended solely for the construction, maintenance and utilization of such facility.
167-88	Sept 14		Opinion letter to The Honorable E.J. Cantrell
168-88	Nov 10	EXPUNGEMENT. LIENS-LIEN SEARCH. DIRECTOR OF REVENUE.	The word "expunged" used in Sections 144.380.1(2) and 143.902.1(2), House Bill No. 1335, 84th General Assembly, Second Regular Session (1988), means striking out, blotting, obliterating or in any permanent manner completely concealing or excising a record or part of a record. Liens filed in error by the director of revenue are not to be released by the filing of a document subsequent to the recording of such liens

			because such liens are to be expunged, thereby leaving nothing to be released.
169-88	Sept 13	BALLOTS. CANDIDATES. ELECTIONS. GENERAL ELECTIONS. PRIMARY CANDIDATE. PRIMARY ELECTIONS.	Section 115.351, RSMo 1986, prevents a Republican candidate who was defeated in the primary election from filing as an independent candidate for the same office in the November general election.
177-88	Nov 28	ABSENTEE VOTING. ELECTION BALLOTS. ELECTIONS. NOTARY PUBLIC.	Under Section 115.291, RSMo 1986, a notary public, or any other person of the voter's choice, may assist a voter in voting his absentee ballot if the voter is blind, unable to read or write the English language or physically incapable of voting his ballot.
178-88	Nov 8	ARCHITECTS AND ENGINEERS. BOARD FOR ARCHITECTS, PROFESSIONAL ENGINEERS, AND LAND SURVEYORS. COUNTY HEALTH CENTER. PROFESSIONAL REGISTRATION, DIVISION OF.	Section 327.421, RSMo 1986, requires a county health board to hire a currently registered architect to prepare specifications used in the construction of an addition to its building.
179-88	Nov 2	CITIES, TOWNS AND VILLAGES. CITY STREETS. FOURTH CLASS CITIES.	A fourth class city does not have the authority to create and operate a toll street.
186-88	Nov 10	COUNTY COMMISSION. JUVENILE COURT. JUVENILE COURT BUDGET. CIRCUIT COURTS.	When a juvenile court, pursuant to Section 1 of House Substitute for Senate Committee Substitute for Senate Bill No. 622, 84th General Assembly, Second Regular Session (1988) determines that its juvenile court personnel should be paid more than the state compensation provided in Section 211.381, RSMo 1986, and the county commission disagrees with the juvenile court's determination of the reasonableness of the additional compensation, the county must either provide for the payment of the additional compensation, obtain the consent of the circuit court to change or disapprove the request, or file a petition for review with the Judicial Finance Commission in accordance with Sections 50.640 and 477.600, RSMo 1986.

189-88	Nov 21	DEPARTMENT OF HEALTH. DIVISION OF FAMILY SERVICES. EMPLOYEES. HEALTH, BOARD OF. SOCIAL SERVICES, DEPARTMENT OF. STATE EMPLOYEES.	A private physician who, for compensation, furnishes medical consultant services to a facility of the Division of Family Services for three or four hours a week is “holding any other ... employment under the state of Missouri” within the meaning of Section 191.400, RSMo 1986.
193-88	Dec 22	BUS OPERATOR'S LICENSE. BUS TRANSPORTATION FOR PUBLIC SCHOOLS. ELEMENTARY AND SECONDARY EDUCATION, DEPT. OF. DEPARTMENT OF REVENUE. SCHOOLS. SCHOOL TRANSPORTATION.	1. In a first or second class county or in a third or fourth class county whose board of education has adopted written compliance with Section 302.272, RSMo Supp. 1988 , Section 167.242, RSMo Supp. 1988 exempts an individual transporting four or fewer students in a privately owned automobile from being licensed as a school bus operator or as a chauffeur while under contract to transport with a public school or the State Board of Education. 2. There is no requirement under Section 167.242 that the operator be paid compensation for the exemption to be applicable but the operator must have a legally valid contract to transport. 3. A public school district employee's contract would be considered a “contract to transport” under Section 167.242 only if it contained an express provision regarding the employee's responsibilities to transport school children. 4. In a first or second class county or in a third or fourth class county whose board of education has adopted written compliance with Section 302.272, Section 167.242 does not exempt an individual transporting four or fewer students in an automobile owned by the school district from being licensed as a school bus operator because the exemption applies only to automobiles which are privately, not publicly, owned; therefore, the operator would be required to obtain a school bus operator's permit.



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January 19, 1988

OPINION LETTER NO. 4-88

The Honorable Bob Feigenbaum
Representative, District 77
State Capitol Building, Room 300-A
Jefferson City, Missouri 65101

Dear Representative Feigenbaum:

This opinion letter is in response to your request for an opinion concerning the relative roles of state government and the federal government with respect to transportation of radioactive materials including nuclear reactor wastes. Your opinion request states your question as follows:

The federal government exercises general preemption over state and local governments in the regulation of transportation of radioactive materials and waste. The authority to do so is contained in the interstate commerce clause, the Atomic Energy Act of 1954, the Energy Reorganization Act of 1974, and the Hazardous Materials Transportation Act. State and local governments are given primary responsibility for emergency response to radioactive materials transportation accidents. In keeping within this responsibility, in what specific areas are the state and local governments allowed to impose requirements and restrictions on the transportation of radioactive materials without being in conflict with federal preemption provisions?

As will be explored a bit further in this opinion, the answers to some of the areas where the states may or may not be able to exercise authority result from Department of Transportation (DOT) Inconsistency Rulings (IR), federal constitution and

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statutes, regulations and case law. Much of the opinion is based necessarily on the inconsistency rulings, which are given considerable weight by the courts, but are only advisory in nature, and thus would not have the weight of case law unless incorporated into court opinions.

Certain federal statutes involved in this opinion include the Atomic Energy Act of 1954, 42 U.S.C. § 2011, et seq. (AEA); the Hazardous Materials Transportation Act, 49 U.S.C. § 1801, et seq. (HMTA); the Energy Reorganization Act of 1974 which established the Nuclear Regulatory Commission, 42 U.S.C. § 5841, et seq.; and the Federal Railroad Safety Act, 45 U.S.C. § 431, et seq. Based in part on these statutes, there are three primary doctrines which establish the invalidity of certain state efforts to control the transportation of nuclear wastes and materials. These include preemption by federal law, interference with interstate commerce and federal immunity in certain areas.

Concerning preemption, it has been determined that under the AEA the federal government has occupied the entire field of nuclear safety so that most state efforts toward nuclear safety are preempted. The Supreme Court sets forth the preemption doctrine as follows:

As we recently observed in Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983), state law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. Id., at 203-204, 103 S.Ct., at 1721-1722; Fidelity Federal Savings & Loan Assn. v. De la Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 83 S.Ct.

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1210, 1217-1218, 10 L.Ed.2d 248 (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). Pacific Gas & Electric, supra, at 203-204, 103 S.Ct. at 1721-1722. Kerr-McGee contends that the award in this case is invalid under either analysis. We consider each of these contentions in turn.

In Pacific Gas & Electric, an examination of the statutory scheme and legislative history of the Atomic Energy Act convinced us that "Congress...intended that the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant." 461 U.S., at 205, 103 S.Ct., at 1723. Thus, we concluded that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." Id., at 212, 103 S.Ct. at 1726.

Silkwood v. Kerr-McGee Corporation, 464 U.S. 238, 248-249, 104 S.Ct. 615, 621-622, 78 L.Ed.2d 443, 452-453 (1984).

Thus, where state requirements in the area of nuclear plant regulation are motivated by safety concerns, the Supreme Court has stated that the first method of preemption applies, a completely occupied field with which any state law is preempted. It seems likely this would also apply in the area of transportation. However, despite this complete occupancy of the field of nuclear safety, state controls which concentrate on other areas may succeed. The state of California successfully regulated development of nuclear power plants for economic reasons which were determined by the court in Pacific Gas & Electric Co. to be separate and apart from nuclear concerns, therefore a valid basis for state regulation. Such other regulation is very narrow, however, in view of the federal occupancy of the entire field of nuclear safety based on the AEA. It would seem difficult to apply this approach to deal with safety in the area of radioactive materials transportation.

Attachment A taken from a report prepared for the Department of Energy, sets forth an analysis of the status of

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preemption under the Atomic Energy Act. While the analysis indicates that preemption of state transportation by AEA has not yet been decided in any cases, holdings in other areas of radioactive materials safety issues do indicate transportation safety controls by states would be preempted.

In the second category of preemption in Silkwood, the Hazardous Materials Transportation Act preempts any state regulations that are inconsistent in that they conflict with that act or regulations pursuant to the act.

State laws inconsistent with federal laws in the field of nuclear materials and thus preempted, are preempted because of the Supremacy Clause in the United States Constitution. The Supremacy Clause generally provides that federal law is the supreme law of the land, and the preemption doctrine is a result of the application of this clause. Jersey Central Power & Light Company v. Township of Lacey, 772 F.2d 1103, 1110 (3rd Cir. 1985).

The Commerce Clause of the United States Constitution is another basis for precluding state action, in that it prohibits any undue burden on commerce which might be imposed by state regulation on shipment of radioactive wastes or materials.

For the Commerce Clause to preclude state regulation of transportation of radioactive materials and wastes, it must be determined that the federal law at issue is valid and that the state law interferes with the federal scheme either expressly, by implication or by actual or potential conflict between the federal and state provisions. The implied interference may be found by the pervasiveness of the federal regulatory scheme, the dominance of the federal interest, including an interest in uniformity across the nation, or thirdly interference with federal purposes.

The Commerce Clause is thus not an absolute prohibition, but requires a balancing of the burden imposed on interstate commerce with the benefits the law would afford the state to determine whether there is such a burden on interstate commerce unjustified by benefits to a state that it would invalidate the state law.

The Hazardous Materials Transportation Act is a major source of preemption of state regulations concerning hazardous, including radioactive materials. The express preemption contained in the Hazardous Materials Transportation Act (HMTA) provides that a state requirement that is inconsistent with the HMTA or regulations thereunder is preempted unless the Secretary

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of Transportation grants a waiver of preemption. 49 U.S.C. § 1811. The federal regulation to determine if there is preemption due to the Hazardous Materials Transportation Act requires the Department of Transportation to consider whether compliance with both state and federal law is possible, and the extent to which the state requirement is an obstacle to accomplishing the purposes of the HMTA and regulations thereunder, the HMRs.

As stated in a Department of Transportation (DOT) Inconsistency Ruling, IR-2, the manifest purpose of the Hazardous Materials Transportation Act and the hazardous materials regulations is safety in transportation. The Department of Transportation has determined that any delay in transportation is incongruous with safety, and therefore any state requirements which cause delay are deemed inconsistent. The Department of Transportation requirements for radioactive materials apply to source, by-product and special nuclear materials. These are categories of radioactive substances and do include spent fuel from nuclear power plants.

Under the Hazardous Materials Transportation Act, radioactive materials are treated as a subset of hazardous materials in 49 C.F.R. and thus subject to hazardous materials rules generally, as well as those pertaining to radioactive materials.

In some areas any state requirements are likely to be determined an obstacle to operation of HMTA, because the Department of Transportation has also determined that these areas need national uniformity. They include hazardous material packaging standards, hazardous material warning systems and hazardous material class definitions. IR-6, 47 Fed. Reg. at 51,994.

Because of the overwhelming number of rulings finding that state requirements are inconsistent, and thus preempted, the Department of Transportation's regulation, HM-164, Appendix A to 177, 49 C.F.R. has proved to be generally offensive to most states and has been challenged by several states, but so far unsuccessfully.

One analysis has determined that in light of IRs 8, 10, 11, 12, 13 and 15, based largely on the Hazardous Materials Transportation Act and the hazardous materials regulations thereunder, it must be concluded that the federal government almost completely occupies the field of radioactive material transportation safety, and therefore state requirements dealing with this field are generally limited to only:

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1. General traffic control for all traffic.
2. Designation of alternate preferred routes if the requirements of 49 C.F.R. 177.825 (Attachment B) are met. (Copy of DOT advisory to states on how to exercise authority over carriers of hazardous materials consistently with federal requirements attached as Attachment C.)
3. Adoption of federal requirements, or requirements that are consistent with federal requirements.
4. Enforcement of requirements that are consistent with federal requirements.

The major part of the answer to your question must be based on the inconsistency rulings mentioned above, in which the Department of Transportation has considered particular state requirements, and determined whether they are inconsistent with federal requirements, and therefore preempted. As mentioned above, these DOT Rulings, are only advisory in nature, but are given considerable weight by the courts. There is a procedure for a state to request waiver of preemption after its requirement has been deemed inconsistent in one of the inconsistency rulings. However, so far there has been little success by the states with these waivers. The Department of Transportation's position is explained by its policy that non-preemption is meant to be an extraordinary remedy in the field of nuclear waste and materials transportation. Attachment D lists the Inconsistency Rulings through June 1986. Attachment E lists the subject matter of Inconsistency Rulings.

A state applying for a waiver of preemption must (1) make a threshold showing of exceptional circumstances necessitating immediate action for a state to secure more stringent regulation; (2) show that the preempted state requirement affords an equal or greater level of protection to the public as compared with federal requirements; and (3) show that the preempted state requirement does not unreasonably burden commerce.

Some confusion in what state actions are preempted results from the fact that there is regulation by more than one federal agency. Generally, the Nuclear Regulatory Commission regulates the possession, transfer, construction and operation of production and utilization facilities for source, by-product and special nuclear material, including nuclear power plants. However, because of a Department of Transportation regulation declaring the above three materials as hazardous materials, they are also subject to Department of Transportation requirements generally pertaining to (1) physical security during

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transportation and, (2) controlling preparation and packaging of radioactive materials for transportation. Because of this overlap, the NRC and the Department of Transportation have executed a memorandum of understanding (44 Fed. Reg. 38,690) which gives DOT responsibility for setting the design specifications and performance requirements for those materials for which NRC does not set standards. Under this, DOT sets packaging standards for LSA materials and for quantities of non-fissile materials not exceeding type A limits. Pursuant to the memorandum of understanding, DOT also develops standards for (1) the classification of radioactive materials; (2) the external radiation fields, labeling and marking of packages and vehicles; (3) carrier equipment; (4) carrier personnel qualifications; (5) loading, handling and storage procedures; (6) non safeguards - related special transport controls; and (7) all other safety standards not developed by the NRC.

State activities and regulations inconsistent with any of DOT's actions would almost certainly be determined to be inconsistent by DOT should they go to inconsistency rulings, and therefore should be considered preempted. It should also be borne in mind that even if a state requirement satisfies the DOT consistency criteria, it must still be measured against the complete federal occupancy of the field of radioactive safety under the AEA referred to in Silkwood, supra, which is an independent basis for preemption.

With this as background, the following paragraphs deal with particular activities and whether they are preempted or otherwise precluded from state regulation.

Requirements concerning approval of shipments are inconsistent if they differ in any way from the federal requirements but are okay if identical to those requirements. Inconsistency Rulings (IRs) 8, 11, 12, 13, 14 and 15.

State requirements concerning the design for radioactive waste and materials casks are preempted if in any way inconsistent with the federal requirements. IR-8.

State regulations concerning confidentiality of information relating to radioactive waste and materials transportation are preempted if they differ from federal requirements. IRs 8 and 15.

Any state regulations concerning the construction and operation of nuclear plants are preempted by federal laws. Atomic Energy Act of 1954, 42 U.S.C. § 2131. However, as noted above the state of California was successful in its regulation

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of the construction of a nuclear power plant based on economic factors rather than nuclear safety factors.

State courts are not barred from awarding compensatory damage judgments in the case of nuclear accidents, even though it may be argued that this amounts to regulation resulting from state laws. Silkwood v. Kerr-McGee Corporation, supra.

Definitions concerning radioactive materials are inconsistent if they differ from federal definitions, and therefore would probably be considered preempted. IRs 8, 12, 15 and 16.

State and local governments have been handed the major burden for preparation of emergency response plans and emergency response. However, state requirements that an emergency response plans be considered a condition of route approval has been found to be inconsistent because the DOT's Materials Transportation Bureau found this would constitute an obstacle to accomplishing the intent of the Hazardous Materials Transportation Act. The Department of Transportation has a program to help states with enforcement of federal regulations, under its "State Hazardous Materials Enforcement Development" program.

State fines or civil penalties are inconsistent and therefore preempted if they are based on violations of state rules which are different from federal rules. IR-3.

There is a qualification on penalties and fines, however. Even if they are for violations of consistent state rules, they would be determined inconsistent if they are so extreme or arbitrary as to cause rerouting or delay of shipments, though mere differences in amounts do not generally determine inconsistency. IR-3.

State requirements for front and rear mobile escorts if identical to those required by the NRC for radioactive materials are consistent. IR-14. Clearly, any requirements for escorts in addition to those required under federal law are inconsistent. IRs 11 and 13; 49 C.F.R. 177.

Any state fees which may cause a delay in shipment are generally preempted. IR-17. Fees which are unreasonably high or to fund inconsistent state activities such as inconsistent monitoring activity requirements are inconsistent and preempted. IRs 11, 13 and 15. Reasonable fees to fund consistent activities are consistent and not preempted. Therefore it has been found that a \$1,000.00 per cask fee for spent fuel transportation imposed by the state of Illinois for emergency response purposes, not related to inconsistent

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purposes and which do not cause delay, is consistent and not preempted. IR-17.

Local prohibitions on the import of nuclear wastes and materials are preempted as inconsistent. Jersey Central Power & Light Company v. Township of Lacey, supra.

Inspection, monitoring and surveillance requirements which are related to nuclear safety concerns are preempted if they are inconsistent with federal requirements. State inspection requirements are permitted so long as they are consistent with federal requirements. IRs 2, 8, and 15. The state of Illinois rail shipment inspection program adopted unchanged the applicable provisions of the federal inspection requirements from 49 C.F.R.

State requirements which differ from federal insurance or liability requirements or require additional insurance coverage beyond that required by federal requirements are inconsistent and preempted. IR-11.

State requirements for marking, placarding or labeling trucks are inconsistent if different or in addition to federal requirements, and are therefore preempted. Kappelmann v. Delta Air Lines, Inc., 539 F.2d 165 (D.C. Cir. 1976) cert. denied, 429 U.S. 1061, 97 S.Ct. 784 (1977); National Tank Truck Carriers, Inc. v. City of New York, 677 F.2d 270, 274 (2nd Cir. 1982).

State requirements for packaging standards for design and construction are inconsistent and thus preempted if they differ from or add to federal requirements. IR-2. And, state requirements for radioactive materials container testing and certification are inconsistent. IRs 8 and 15.

State requirements for permits and licenses are preempted depending upon what they require, particularly if they are the cause of delay in shipment. IRs 2 and 3. State requirements for submission of information in applications identical to NRC's are consistent, but requirements by a state for submission of NRC approvals and licenses to the state is inconsistent. IR-15. While there is some possibility that mere requirements in permit applications for information already required on Department of Transportation shipping papers may not be preempted, it is considered that requirements for permits for each shipment prior to the shipment or a requirement for carrying the permits on the vehicle or an additional piece of paper that supplies the same information as required by the Department of Transportation shipping papers, probably would

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cause delay and therefore would be inconsistent. IR-2. There is also some possibility that general permits and licenses may be okay or that if the permit system is consistent with federal requirements, that a state requirement to carry and display a decal is consistent. IR-3. However, there also is authority stating that the requirement to display a permit decal has been held to be inconsistent. For a detailed discussion of the permit issue, see National Tank Truck Carriers, Inc. v. Burke, 535 F.Supp. 509 at 517 (D.R.I. 1982), aff'd 698 F.2d 559 (1st Cir. 1983).

Generally, DOT considers that requirements for additional personnel or equipment for nuclear materials or waste transportation are inconsistent and thus preempted. See Attachment C, the DOT Guidelines for state authority over motor carriers.

State requirements for illuminated rear bumper signs have been found inconsistent. IR-1. It does appear, however, that a requirement that headlights be kept on is consistent and therefore not preempted. National Tank Truck Carriers, Inc. v. Burke, supra. IRs 2 and 3.

State requirements for special placards on trucks or other hazard warning requirements are inconsistent if they differ from or are in addition to federal requirements. IRs 2 and 3.

Generally, state requirements for prenotification of shipments have been found to be inconsistent, in particular if they have the potential to delay traffic. IR-6. Where they differ from federal requirements by requiring different people to be notified or more information or documentation, they are inconsistent. IRs 8, 10 and 15. State prenotification requirement the same as the federal requirement is consistent. IR-15. Notice requirements for radioactive materials shipment schedule changes which are identical to NRC regulations are considered consistent. IR-8.

There is a general prohibition on state records and manifest requirements if they differ at all or require anything in addition to federal requirements for entries on the forms. See Attachment C. Specifically, requirements for information or documentation in excess of federal requirements are believed to create additional burden or delay and are therefore inconsistent. Radioactive materials transportation route plans or other documents with shipment-specific information required by the state have been found inconsistent. State requirements for submission of NRC approvals and licenses to the state have been found inconsistent by DOT. IR-15.

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State requirements for shipping papers or additional or different shipping paper entries for radioactive materials than required by federal law have been considered inconsistent by DOT. See Attachment C. A state requirement for red bordered shipping papers for intrastate shipments of hazardous materials has been considered inconsistent. IR-4. A state requirement for certification to the state of the shipment's compliance with federal laws are considered inconsistent. IRs 8 and 15. While radioactive materials information requirements identical to the Nuclear Regulatory Commission are consistent, requirements to submit NRC approvals and licenses to the state are inconsistent. IR-15.

State requirements for registration are preempted by the Atomic Energy Act if related to nuclear safety and if they cause delay in shipment are probably preempted by the HMTA.

Some state requirements in area of accident and emergency response or reports are probably not preempted by AEA or HMTA. However, a state requirement for a written accident report has been considered redundant and thus inconsistent by DOT. IRs 2 and 3. Radioactive materials transportation accident/incident state reporting requirements for other than emergency assistance are inconsistent. Some limited accident reports are permitted under 49 C.F.R. 177 if necessary for emergency assistance. National Tank Truck Carriers, Inc. v. Burke, supra. Apparently general post-accident traffic accident reports are alright and immediate oral accident reports for emergency response are not inconsistent. IRs 2 and 3.

Concerning state routing requirements, the Department of Transportation has an advisory to states concerning how they can exercise authority over motor carriers. A copy is attached as Attachment C. In general, however, state routing restrictions are preempted by HMTA under HM-164, unless they are part of a state-designated alternate route selected with appropriate safety analysis.

Closely connected with routing restrictions are complete denial of highway use. A state cannot deny all highway use for shipments of radioactive materials and wastes. IR-3.

State requirements for storage, loading and handling procedures are in all probability preempted by the Atomic Energy Act if they are an attempt to regulate safety. Silkwood v. Kerr-McGee Corporation, supra.

Some time of day restrictions have been found to be consistent, others inconsistent. Statewide prohibition on all

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hazardous materials transport on weekdays between 7 and 9 a.m. and 4 and 6 p.m. resulted in delay and so was found inconsistent. IR-2. See also National Tank Truck Carriers, Inc. v. Burke, supra. But see National Tank Truck Carriers, Inc. v. City of New York, supra. Restriction of radioactive materials shipments from May through October and prohibition of holiday or inclement weather shipments were found inconsistent. IR-14. However, limited local traffic controls are generally consistent to the extent they deal with particular local safety hazards which are not adequately dealt with by nationwide regulations. IR-2. This includes local authority to restrict or suspend operations when road, weather, traffic or other hazardous conditions or circumstances dictate.

So called "rules of the road" restrictions that apply to all vehicles may apply to hazardous materials vehicles without being inconsistent. IR-3. Separation distances between vehicles is an example. Requiring carriers to use major city thoroughfares so long as federal rules apply elsewhere is consistent. IR-3.

State requirements for railroad cars containing hazardous materials, prohibiting various actions have been found inconsistent and preempted by the Hazardous Materials Transportation Act. These actions include a prohibition on cutting off cars while in motion, permitting hazardous material containing cars from being struck by other cars moving under their own momentum, or coupling cars with unnecessary force. Atchison, Topeka and Santa Fe Railway Company v. Illinois Commerce Commission, 453 F.Supp. 920 (N.D. Ill. 1977).

A review of federal government regulations in the field as of November, 1985 is contained in Attachment F from the Guide to Emergency Response to Radioactive Materials Analysis published by the National Conference of Legislatures, pages 4 and 5.

The above discussion pertains primarily to highway shipments of radioactive materials and, where applicable, would also apply to railroad shipments. Where railroad shipments are involved, another federal statute which must be considered is the Federal Railroad Safety Act, 45 U.S.C. § 421 et seq. In particular § 434 provides:

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or

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standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

Under this act, which must be considered in conjunction with the other federal statutes, a state's attempt to regulate rail shipments of radioactive materials must be considered in light of what federal regulations have been adopted that would trigger the preemption provided for in § 434. National Association of Regulatory Utility Commissioners v. Coleman, 542 F.2d 11 (3rd Cir. 1976). If regulations on the federal level have been adopted, then the state safety measures may still be exempted under the second exemption in § 434, if the state regulation meets § 434 requirements that it is necessary to eliminate or reduce a local safety hazard and further is not incompatible with any federal measures and does not unduly burden interstate commerce. Donelon v. New Orleans Terminal Company, 474 F.2d 1108 (5th Cir. 1973).

Federal transportation regulations have been adopted and are found interspersed throughout 49 C.F.R. parts 100 to 199. State measures consistent with these 49 C.F.R. requirements are apparently not preempted by the federal railroad safety law.

Because of the breadth of material covered in this opinion and the length and complexity of 49 C.F.R., any specific Missouri requirements you might wish to consider should be individually evaluated.

Very truly yours,


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Attorney General

Enclosures

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Federal Preemption of State and Local
Nuclear Transportation Regulations

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January 1985

Prepared for
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U.S. Department of Energy

to establish many of the packaging standards for which the NRC is responsible--enriched uranium hexafluoride, enriched uranium oxide, fuel pellets or rods, and spent fuel--because as typically shipped they constitute "SNM" in quantities sufficient to form a critical mass".

When NRC does relinquish authority pursuant to an agreement with a state, during the period of the agreement the state has "authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards."⁸¹ The NRC may not, however, discontinue regulatory authority over construction and operation of production and utilization facilities; export or import of nuclear materials or facilities; ocean disposal of nuclear wastes; or the disposal of other source, byproduct, or special nuclear materials that NRC determines should require a license.⁸² NRC must also retain authority under these agreements to determine that all applicable standards and requirements are met prior to termination of a byproduct materials license.⁸³ Moreover, notwithstanding an existing agreement between NRC and a state, NRC is authorized to require that the manufacturer, processor, or producer of any product containing source, byproduct or SNM: not transfer possession or control of such product except pursuant to a license issued by the NRC.⁸⁴ The NRC's retention of authority in these areas does not, however, affect the authority of states or localities "to regulate activities for purposes other than protection against radiation hazards," whether or not they are agreement states.⁸⁵

Preemption Under the Atomic Energy Act

To date, no reported judicial opinion has analyzed the issue of the extent to which the Atomic Energy Act (AEA) preempts state and local regulation of nuclear transportation.⁸⁶ However, one Court of Appeals (Illinois v. General Electric Company) has commented on the issue and two recent Supreme Court cases (Pacific Gas and Electric Company v. State Energy Resources Conservation Commission (PG&E); Silkwood v. Kerr-McGee) have dealt exhaustively with the preemptive effect of the AEA on state and local regulation of various aspects of nuclear power reactors. These analyses merit scrutiny for their implications for preemption of transportation regulation.

In Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission (PG&E),⁸⁷ the United States Supreme Court considered whether a California statute conditioning construction of nuclear plants on existence of a federally approved means of disposing of high level nuclear waste was preempted by the AEA. After reviewing the history of the AEA, the Court held that the California statute was not preempted. The Court noted that the NRC's "prime area of concern in the licensing context . . . is national security, public health and safety."⁸⁸ Because California enacted the statute for economic reasons rather than due to safety concerns, the statute lay "outside the occupied field of nuclear safety regulation."⁸⁹

In reaching its holding, the Supreme Court made two observations important for future AEA preemption analysis. First, it determined that the Federal Government has occupied "the entire field of nuclear safety concerns except for the powers expressly ceded to the states."⁹⁰ It then reiterated that the test for preemption in an entirely occupied field is whether "the matter is in any way regulated by the federal government."⁹¹ Thus, any state regulation determined to be an attempt to regulate the safety aspects of nuclear energy will be preempted.

Second, the Court rejected the argument that the reorganization of the AEC in 1974 translated into an abandonment of the objective of promoting nuclear power. Instead, it concluded that "[t]here is little doubt that a primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power."⁹² Arguably then, state and local regulations that conflict with the promotional purposes of the AEA will be preempted under the potential conflict test discussed previously.

It appears, however, that the Supreme Court, under Chief Justice Warren Burger, will be reluctant to find potential conflict with the AEA's promotional provisions. Although the Court could have accepted PG&E's argument that the California statute, which in effect accomplished a moratorium on future nuclear power plant development, frustrated the purposes of the AEA, it declined to do so. Instead, it noted that "the promotion of nuclear power is not to be accomplished "at all costs"⁹³ and concluded that "Congress has left sufficient authority for the states

to allow the development of nuclear power to be slowed or even stopped for economic reasons."⁹⁴

The Supreme Court also refused to find conflict with the promotional purposes of the AEA in Silkwood vs. Kerr-McGee Corporation.⁹⁵ At issue in Silkwood was whether a state authorized award of punitive damages arising from leakage at a federally licensed plutonium processing plant was preempted by the AEA. Kerr-McGee first argued that the award was preempted because its effect was tantamount to a regulation relating to radiation hazards. Although the Court recognized the potential regulatory consequences of the award, it reasoned that "it is difficult to believe Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."⁹⁶

Kerr-McGee also raised the argument that permitting awards of punitive damages for radiation injury conflicted with the promotional purposes of the AEA. Again, the Supreme Court refused to find preemption on this basis. Repeating its admonition in PG&E that the promotion of nuclear energy development is not to be accomplished at all costs, the Court supported its decision by noting that the promotional provision of the AEA,⁹⁷ requires that atomic energy be developed and utilized only to the extent it is consistent "with the health and safety of the public."⁹⁸ The Supreme Court reasoned that this provision disclaimed any congressional intent to promote atomic energy at the expense of those injured by the process.⁹⁹ Absent Congressional intent to preempt state common law remedies for radiation injuries, and absent an irreconcilable conflict with the federal regulatory scheme, the Silkwood court upheld the award of damages.

While neither PG&E nor Silkwood dealt specifically with nuclear waste transportation regulations, that issue was before a Federal Court of Appeals in Illinois v. General Electric Company.¹⁰⁰ That case involved a challenge to the constitutionality of the Illinois Spent Fuel Act, which prohibited disposal or storage in Illinois of spent nuclear fuel used in a power generating facility located outside the state. The court found that Illinois' attempted regulation was an unconstitutional burden on interstate commerce. More important for our purposes was the court's

alternative holding, made to assist the Supreme Court should it grant review of the case. Although the alternative holding has no precedential effect, the court did note, without analysis, that the "AEA . . . preempts state regulation of the storage and shipment for storage, interstate and intrastate alike, of spent nuclear fuel."¹⁰¹

Taken together, PG&E and Silkwood (and to a limited extent, Illinois v. General Electric Company) provide a framework for the analysis of implied AEA preemption issues, including the state and local regulation of nuclear waste transport. The primary question the court will address is whether the state or local requirement is an attempt to regulate nuclear safety. As in any characterization question, the outcome of such an inquiry depends in part upon how deeply the court will inquire into legislative motive. In PG&E, the Supreme Court indicated that it would be reluctant to look beyond the stated purposes of the California law and would accept the interpretation made by the Court of Appeals.¹⁰² However, this same "hands off" approach may not be adopted by the lower courts. For example, in one recent case (County of Suffolk v. Long Island Lighting Company) the Court of Appeals for the Second Circuit decided that certain claims arising from alleged negligence, breach of contract, misrepresentation and concealment in the design and construction of a nuclear power plant were motivated by safety concerns and were therefore preempted by the AEA.¹⁰³ On the other hand, the Court of Appeals for the Seventh Circuit has apparently taken a different approach (in City of West Chicago v. Kerr-McGee), holding that a public nuisance complaint against Kerr-McGee Chemical Corporation by the City of West Chicago was not preempted by the AEA. Instead, it decided that the allegations pertaining to dangerous conditions (such as open pits filled with chemicals and refuse, holes in floors, and fallen roofing) were attempts by the city to regulate non-radiation hazards and therefore were permissible. This finding was made even though the operation of the factory in producing compounds from radioactive ores meant that the alleged dangerous conditions necessarily created radiation hazards.¹⁰⁴

While these two cases fail to provide any clear answer to the question of what level of inquiry courts will make into a legislature's

(or plaintiff's) motives, they do illustrate one important element in judicial decision making--the wording of the complaint. The City of West Chicago carefully avoided mention of radiologic hazards in its complaint, whereas Suffolk County's complaint referred to potentially dangerous radiologic effects arising from Long Island Lighting's alleged actions.

A brief description of other recent AEA preemption holdings may be useful in determining whether state and local transportation requirements for nuclear waste will be preempted. Generally, courts will hold that local regulations are preempted if they fall within the totally occupied field of nuclear safety concerns, or if they fall within an area expressly reserved to the NRC in AEA §2021.

A number of cases have held that state or local requirements are preempted under the safety rationale. In Northern States Power Co. v. Minnesota,¹⁰⁵ the court preempted state conditions imposed in a waste disposal permit regulating the level of radioactive discharges and requiring monitoring programs for the detection of such releases. Public Interest Research Group of New Jersey v. State Department of Environmental Protection,¹⁰⁶ involved a finding by the New Jersey court that the State Commissioner had no power under a state act to make an independent judgment as to the ability of a planned nuclear energy facility to protect against radiation hazards. In United Nuclear Corporation v. Cannon,¹⁰⁷ the AEA was found to preempt a state requirement requiring a nuclear power company to post a 20-year bond to cover any costs expended by the state to decontaminate areas surrounding its nuclear processing facilities. On the other hand, in South Dakota Public Utilities Commission v. FERC,¹⁰⁸ the Wisconsin Public Service Commission's decision to deny a construction permit for a nuclear power plant was held not to be barred by the AEA. The court reasoned that the Commission's denial turned not on safety factors, but was prompted by the lack of demonstrated need for the nuclear plant, significant economic disincentives, and the superiority of alternative means of generation.

The second rationale commonly used for preemption--that the regulation falls within an area reserved to the NRC--received support in PG&E.¹⁰⁹ There, the Supreme Court clearly stated that it would be

impermissible for a state to attempt to regulate the construction or operation of a nuclear power plant, even for nonsafety concerns.¹¹⁰ Several other cases are in accord with PG&E in this regard. In United States of America and Trustees of Columbia University v. City of New York,¹¹¹ the Court of Appeals held that a city licensing requirement for a nuclear reactor was preempted when the license pertained to health and safety. And in Suffolk County v. Long Island Lighting Company,¹¹² the county's attempt to obtain a court order for an inspection of a nuclear power plant under construction was held preempted because the inspection of nuclear plants is within the reserved area of construction and operation of nuclear facilities. Trosten and Anacarrow¹¹³ argue that the legislative history of §2021 of the AEA indicates that transport of nuclear waste was reserved to the NRC as part of its exclusive power over the "construction and operation of production and utilization facilities."¹¹⁴ This theory has not yet been tested in court however, and therefore has no predictive value.

In summary, state and local regulation of nuclear waste transport will be preempted under the AEA if it is characterized by the court as being an attempt at nuclear safety regulation. Such regulation may also be preempted if it conflicts with the promotion of atomic energy, although the Supreme Court appears reluctant to find state law preempted on this basis. Moreover, the AEA probably preempts state and local regulations pertaining to physical security of materials over which NRC has regulatory authority, prenotification to states regarding shipments of certain types of nuclear waste and spent nuclear fuel, and packaging of materials for which NRC sets packaging standards. Finally, state and local regulations will be preempted if they are found to be regulations made within the explicitly reserved powers identified in §2021 of the AEA.

Preemption Under the Hazardous Materials Transportation Act

The Hazardous Materials Transportation Act (HMTA) authorizes the Secretary of Transportation to issue "regulations for the safe transportation in commerce of hazardous materials".¹¹⁵ These regulations (hereinafter referred to as HMRs) are applicable to any person

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The vehicle owner shall retain the certificate for at least 1 year after withdrawal of the certification.

(49 U.S.C. 1803, 1804, 1808; 49 CFR 1.53, App. A to Part 1)

[29 FR 18795, Dec. 29, 1964. Redesignated at 32 FR 5606, Apr. 5, 1967]

EDITORIAL NOTE: For Federal Register citations affecting § 177.824, see the List of CFR Sections Affected appearing in the Finding Aids section of this volume.

§ 177.825 Routing and training requirements for radioactive materials.

(a) The carrier shall ensure that any motor vehicle which contains a radioactive material for which placarding is required is operated on routes that minimize radiological risk. The carrier shall consider available information on accident rates, transit time, population density and activities, time of day and day of week during which transportation will occur. In performance of this requirement the carrier shall tell the driver that the motor vehicle contains radioactive materials and shall indicate the general route to be taken. This requirement does not apply when:

(1) There is only one practicable highway route available, considering operating necessity and safety, or

(2) The motor vehicle is operated on a preferred highway under conditions described in paragraph (b) of this section.

(b) Unless otherwise permitted by this section, a carrier and any person who operates a motor vehicle containing a package of highway route controlled quantity radioactive materials as defined in § 173.403(l) of this subchapter shall ensure that the vehicle operates over preferred routes selected to reduce time in transit, except that an Interstate System bypass or beltway around a city shall be used when available.

(1) A preferred route consists of:

(i) An Interstate System highway for which an alternative route is not designated by a State routing agency as provided in this section, and

(ii) A State-designated route selected by a State routing agency (see § 171.8 of this subchapter) in accordance with the DOT "Guidelines for Selecting Preferred Highway Routes for High-

way Route Controlled Quantity Shipments of Radioactive Materials".

(2) When a deviation from a preferred route is necessary (including emergency deviation, to the extent time permits), routes shall be selected in accordance with paragraph (a) of this section. A motor vehicle may deviate from a preferred route under any of the following circumstances:

(i) Emergency conditions that would make continued use of the preferred route unsafe.

(ii) To make necessary rest, fuel and vehicle repair stops.

(iii) To the extent necessary to pick up, deliver or transfer a highway route controlled quantity package of radioactive materials.

(c) A carrier (or his agent) who operates a motor vehicle which contains a package of highway route controlled quantity radioactive materials as defined in § 173.403(l) of this subchapter shall prepare a written route plan and supply a copy before departure to the motor vehicle driver and a copy to the shipper (before departure for exclusive use shipments, or otherwise within fifteen working days following departure). Any variation between the route plan and routes actually used, and the reason for it, shall be reported in an amendment to the route plan delivered to the shipper as soon as practicable but within 30 days following the deviation. The route plan shall contain:

(1) A statement of the origin and destination points, a route selected in compliance with this section, all planned stops, and estimated departure and arrival times; and

(2) Telephone numbers which will access emergency assistance in each State to be entered.

(d) No person may transport a package of highway route controlled quantity radioactive materials as defined in § 173.403(l) of this subchapter, on a public highway unless:

(1) The driver has received within the two preceding years, written training on:

(i) Requirements in Parts 172, 173, and 177 of this subchapter pertaining to the radioactive materials transported;

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(ii) The properties and hazards of the radioactive materials being transported; and

(iii) Procedures to be followed in case of an accident or other emergency.

(2) The driver has in his immediate possession a certificate of training as evidence of training required by this section, and a copy is placed in his qualification file (see § 391.51 of this title), showing:

(i) The driver's name and operator's license number;

(ii) The dates training was provided;

(iii) The name and address of the person providing the training;

(iv) That the driver has been trained in the hazards and characteristics of highway route controlled quantity radioactive materials; and

(v) A statement by the person providing the training that information on the certificate is accurate.

(3) The driver has in his immediate possession the route plan required by paragraph (c) of this section and operates the motor vehicle in accordance with the route plan.

(e) A person may transport irradiated reactor fuel only in compliance with a plan if required under § 173.22(c) of this subchapter that will ensure the physical security of the material. Variation for security purposes from the requirements of this section is permitted so far as necessary to meet the requirements imposed under such a plan, or otherwise imposed by the U.S. Nuclear Regulatory Commission in 10 CFR Part 73.

(49 U.S.C. 1803, 1804, 1808; 49 CFR 1.53, App. A to Part 1)

[Amdt. 177-52, 46 FR 5316, Jan. 19, 1981, as amended by Amdt. 177-57, 48 FR 10247, Mar. 10, 1983; Amdt. 177-58, 48 FR 17094, Apr. 21, 1983; Amdt. 177-68, 51 FR 5915, Feb. 18, 1986]

§ 177.826 Carrier's registration statement; flammable cryogenic liquids.

(a) No person may transport a flammable cryogenic liquid in a portable tank or a cargo tank unless he has filed a registration statement by certified mail, return receipt requested, with the Director, OHMT, RSPA in accordance with paragraphs (b), (c) and (d) of this section.

(b) The registration statement must contain the following information:

(1) The carrier's name and principal place of business.

(2) Locations where cargo tanks used to transport flammable cryogenic liquids are domiciled.

(3) The serial number or vehicle identification number of each cargo tank used by the carrier to transport flammable cryogenic liquids, and the name of each flammable cryogenic liquid transported in each cargo tank.

(c) The registration statement must be filed:

(1) Initially between January 1 and February 28, 1985 (this initial statement is only required to contain information regarding operations that took place during the 90 days prior to the date of the statement); and

(2) Subsequently, between January 1 and February 28 of each odd numbered year after 1985.

(d) For equipment obtained or operations begun between the two-year filing intervals specified in paragraph (c) of this section, the information must be provided on the registration statement filed during the next required filing period.

(Approved by the Office of Management and Budget under control number 2137-0541)

(49 U.S.C. 1803, 1804, 1808; 49 CFR 1.53, App. A to Part 1)

[Amdt. 177-60, 48 FR 27700, 27713, June 16, 1983; 48 FR 50442, Nov. 1, 1983]

Subpart B—Loading and Unloading

NOTE: For prohibited loading and storage of hazardous materials, see § 177.848.

§ 177.834 General requirements.

(a) Packages secured in a vehicle. Any tank, barrel, drum, cylinder, or other packaging, not permanently attached to a motor vehicle, which contains any flammable liquid, compressed gas, corrosive material, poisonous material, or radioactive material must be secured against movement within the vehicle on which it is being transported, under conditions normally incident to transportation.

(b) No hazardous materials on pole trailers. No hazardous materials may

Pt. 177, App. A

49 CFR Ch. I (10-1-86 Edition)

EDITORIAL NOTE: For Federal Register citations affecting § 177.870 see the List of CFR Sections Affected appearing in the Finding Aids section of this volume.

APPENDIX A—RELATIONSHIP BETWEEN ROUTING REQUIREMENTS IN PART 177 WITH STATE AND LOCAL REQUIREMENTS

I. Purpose. This appendix is a statement of the Department of Transportation policy regarding the relationship of State and local rules with Federal rules in Part 177 of this subchapter for routing motor carriers transporting radioactive materials. The purpose of this appendix is to advise a State or local government how it can exercise authority over motor carriers under its own laws in a manner that the Department of Transportation considers to be consistent with rules in Part 177 (see 49 U.S.C. 1811(a)). This appendix and Part 177 do not delegate Federal authority to regulate motor carriers.

II. Definition. "Routing rule" means any action which effectively redirects or otherwise significantly restricts or delays the movement by public highway of motor vehicles containing hazardous materials, and which applies because of the hazardous nature of the cargo. Permits, fees and similar requirements are included if they have such effects. Traffic controls are not included if they are not based on the nature of the cargo, such as truck routes based on vehicle weight or size, nor are emergency measures.

III. Highway route controlled quantity radioactive materials. A. State routing rules. A State routing rule which applies to highway route controlled quantity radioactive materials is inconsistent with Part 177 if:

1. It prohibits transportation of highway route controlled quantity radioactive materials by highway between any two points without providing an alternate route for the duration of the prohibition; or

2. It does not meet all of the following criteria:

(a) The rule is established by a State routing agency as defined in § 171.8 of this subchapter;

(b) The rule is based on a comparative radiological risk assessment process at least as sensitive as that outlined in the "DOT Guidelines";

(c) The rule is based on evaluation of radiological risk wherever it may occur, and on

a solicitation and substantive consideration of views from each affected jurisdiction, including local jurisdictions and other States; and

(d) The rule ensures reasonable continuity of routes between jurisdictions.

B. Local routing rules. A local routing rule that applies to highway route controlled quantity radioactive materials is inconsistent with this Part if it prohibits or otherwise affects transportation on routes or at locations either:

1. Authorized by Part 177, or

2. Authorized by a State routing agency in a manner consistent with Part 177.

IV. Quantities of radioactive materials required to be placarded. A State or local routing rule that applies to a radioactive material (other than a highway route controlled quantity radioactive material), for which Part 177 requires placarding, is inconsistent with Part 177 unless it is identical to § 177.825(a) of this part.

V. Radioactive materials for which placarding is not required. A State or local routing rule that applies to a radioactive material for which Part 172 does not require placarding is inconsistent with this part.

VI. Other related State and local rules. A State or local transportation rule is inconsistent with Part 177 if it:

A. Conflicts with physical security requirements which the Nuclear Regulatory Commission has established in 10 CFR Part 73 or requirements approved by the Department of Transportation under § 173.22(c) of this subchapter;

B. Requires additional or special personnel, equipment, or escort;

C. Requires additional or different shipping paper entries, placards, or other hazard warning devices;

D. Requires filing route plans or other documents containing information that is specific to individual shipments;

E. Requires prenotification;

F. Requires accident or incident reporting other than as immediately necessary for emergency assistance; or

G. Unnecessarily delays transportation.

(49 U.S.C. 1803, 1804, 1808, 49 CFR 1.51, App. A to Part 1)

[Amdt. 177-52, 46 FR 5317, Jan. 19, 1981, as amended by Amdt. 177-57, 48 FR 10247, Mar. 10, 1983; Amdt. 177-58, 48 FR 17094, Apr. 21, 1983]

INCONSISTENCY RULINGS UNDER 49 U.S.C. 1811(a)

IR-1	NYC/Brookhaven	43 FR 16954	Apr. 20, 1978
IR-2	Rhode Island	44 FR 75566	Dec. 20, 1979
	Appeal	45 FR 71881	Oct. 30, 1980
IR-3	Boston, MA	46 FR 18918	Mar. 26, 1981
	Appeal	47 FR 18457	Apr. 29, 1982
IR-4	Washington State	47 FR 1231	Jan. 11, 1982
IR-5	NYC/Ritter	47 FR 51991	Nov. 18, 1982
IR-6	Covington, KY	48 FR 760	Jan. 6, 1983
Nine-pack:	PREAMBLE	49 FR 46632	Nov. 27, 1984
IR-7	New York State	49 FR 46635	Nov. 27, 1984
IR-8	Michigan	49 FR 46637	Nov. 29, 1984
IR-9	Governor of Vermont	49 FR 46644	Nov. 27, 1984
IR-10	New York State Thruway	49 FR 46645	Nov. 27, 1984
	Correction	50 FR 9939	Mar. 12, 1985
IR-11	Ogdensburg Bridge	49 FR 46647	Nov. 27, 1984
IR-12	St. Lawrence County, NY	49 FR 46650	Nov. 27, 1984
IR-13	Thousand Islands Bridge	49 FR 46653	Nov. 27, 1984
IR-14	Jefferson County, NY	49 FR 46656	Nov. 27, 1984
IR-15	Vermont Agency of Trans.	49 FR 46660	Nov. 27, 1984
IR-16	Tucson, AZ	50 FR 20872	May 20, 1985
IR-17	State of Illinois	51 FR 20925	June 9, 1986

APPENDIX CDOT Inconsistency Rulings and Appeals

The Materials Transportation Bureau of DOT has issued 16 inconsistency rulings dealing with state or local regulations on hazardous materials.

Two tests are used to determine inconsistency. ; First, the "obstacle" test helps decide if the nonfederal regulation presents an obstacle to accomplishing the purposes of HMTA and its subsequent regulations. Second, the "dual compliance" test determines if it is possible to comply with both federal and nonfederal requirements.

The rulings concerned (1) New York City's ban on the transport of spent fuel and large quantity radioactive materials; (2) Rhode Island's regulations on shipments of liquefied propane gas; (3) Boston's rules governing certain hazardous materials within the city; (4) Washington state's rule requiring red or red-bordered shipping papers; (5) New York City's administrative code governing definition of certain hazardous materials; (6) Covington's (Kentucky) rule requiring advance notice of shipments of all hazardous materials going through its jurisdiction (no inconsistencies were found in rulings (7) and (9) [letters from the governors of Vermont and New York to the Nuclear Assurance Corporation]); (8) Michigan State Fire Safety Board and Department of Public Health; (10) New York State Thruway Authority; (11) Ogdensburg (New York) Bridge and Port Authority; (12) St. Lawrence County (New York); (13) Thousand Islands Bridge Authority (New York); (14) Jefferson County (New York); (15) Vermont Agency of Transportation; and (16) Tucson, Arizona's ban on transportation of radioactive materials through the city. Rulings 8-15 had multiple areas in common that were found inconsistent, i.e.:

Go Definitions of radioactive materials;

- o Prenotification/permit requirements;
- o Additional personnel, equipment, escorts, etc.;
- o Additional packaging/container requirements; and
- o Insurance requirements.

New York City's ban on spent fuel as well as the Rhode Island and the Boston rulings were all appealed. DOT was upheld in each appeal. In each case, the federal government had emphasized (1) uniformity of regulations (to prevent confusion about regulations--a safety hazard when it occurs), (2) overall safety--but not at the expense of another jurisdiction (a matter of routing), and (3) unimpeded traffic or the safety hazard created by unnecessary delays. These are the reasons for addressing the issues of hazard warnings, packaging, reporting requirements, hazardous materials definition questions, redundancy of state requirements, time-of-day bans, and routing bans. MTB sees uniformity and safety as two sides of the same coin.

DOT Inconsistency Rulings

Federal Register, April 20, 1978, Vol. 48, No. 77.

DOT--Materials Transportation Bureau, New York City Health Code, Notice of Inconsistency Ruling.

Federal Register, December 20, 1979, Vol. 49, No. 246.

DOT--State of Rhode Island--Rules and Regulations Governing the Transportation of Liquefied Natural Gas and Liquefied Propane Gas Intended To Be Used by a Public Utility.

Federal Register, March 26, 1981, Vol. 46, No. 58.

DOT--City of Boston--Rules Governing Transportation of Certain Hazardous Materials by Highway Within the City.

Federal Register, January 11, 1982, Vol. 47, No. 6.

Research and Special Programs Administration--State of Washington House Bill No. 1870 Governing Requirements for Red or Red-Bordered Shipping Papers for Hazardous Materials.

Federal Register, November 18, 1982, Vol. 47, No. 223.

Inconsistency Ruling IR-5; City of New York Administrative Code Governing Definitions of Certain Hazardous Materials.

Federal Register, January 6, 1983, Vol. 48, No. 4.

Inconsistency Ruling IR-6; City of Covington Ordinance Governing Transportation of Hazardous Materials by Rail, Barge, and Highway within the City.

Federal Register, November 27, 1984, Vol. 49, No. 229.

Inconsistency Rulings IR-7 - IR-15.

Federal Register, May 20, 1985, Vol. 50, No. 97.

Inconsistency Ruling IR-16; Tucson City Code Governing Transportation of Radioactive Materials.

Appeals to DOT Inconsistency Rulings

Federal Register, October 30, 1980, Vol. 45, No. 212, p. 71881.

State of Rhode Island Rules and Regulations Governing the Transportation of Liquefied Natural Gas and Liquefied Propane Gas Intended To Be Used by a Public Utility. Inconsistency Ruling (IR-2); Notice of Decision on Appeal.

Federal Register, April 29, 1982, Vol. 47, No. 83, p. 18457.

City of Boston Rules Governing Transportation of Certain Hazardous Materials by Highway Within the City.

The City of New York v. The United States Department of Transportation, 715 F.2d 732 (2d Cir., 1983).

The City of New York v. The United States Department of Transportation, 104 S. Ct. 1403.

Non-Preemption Determination

Department of Transportation, Research and Special Programs Administration, [Docket No. NPDA-2] City of New York; Hazardous Materials Transportation; Non-Preemption Determination No. NPD-1, September 9, 1985.

with emergencies involving their release. Effective dissemination of that knowledge becomes a challenging task of organization and one that will always involve state government. This report is designed to acquaint state legislators with the issues and problems that may involve state legislation relating to radioactive materials accident response.

ATTACHMENT F

GOVERNMENT REGULATION

Federal

The U.S. Department of Transportation's (DOT) Code of Federal Regulations, 49 CFR, regulates all modes of transportation of radioactive materials. Highway carriers are covered in §§350-399, rail carriers in §§200-268. The U.S. Nuclear Regulatory Commission's (NRC) regulations on radioactive materials transportation are in 10 CFR §§71, 73, and 75. The Federal Aviation Administration (FAA) covers air carriers in 14 CFR §§121 and 135. The U.S. Coast Guard (USCG) regulates water carriers in 46 CFR §§146-148 and in 33 CFR §126. The U.S. Postal Service regulations for postal shippers and carriers are in the Domestic Mail Manual and Publication 6, Radioactive Materials (9-83). The U.S. Environmental Protection Agency (EPA) regulations are in 40 CFR. The EPA and DOT coregulate some radioactive materials, which are identified by the letter "E" in the first column of DOT's hazardous materials table in 49 CFR §172.101 (11-84). The U.S. Department of Energy (DOE) is a quasi-regulator in that it requires its contractors to obey all federal regulations.

In 49 CFR, radioactive materials are treated as a subset of hazardous materials. The regulations establish what kinds of events must be reported, what kinds of packages must be used, what labels and placards must be affixed to the packages and transport vehicle, and what the external dose limits are for packages and transport. Routing criteria also are prescribed

for highway route controlled quantities in Type B packaging, including spent fuel.

The transportation sections of 10 CFR focus on fissile radioactive materials and on quantities of RAM (except low specific activity (LSA) materials) exceeding Type A limits. NRC imposes physical security requirements on its licensees for spent fuel and highway route controlled quantities of radioactive materials while in transit. NRC also defines the circumstances that would trigger the need for advance notification of certain kinds of shipments of radioactive materials (10 CFR §§71.5a, 73.27) (1-85).

Appendix A contains the federal laws relating to radiological emergencies.

State and Local

State and local governments bear the preponderance of the burden of preparation for emergency response. State offices must:

- o Develop and distribute an emergency response plan;
- o Designate the response teams;
- o Coordinate with federal, local, and other state agencies;
- o Negotiate interstate agreements for accidents close to a border;
- and
- o Ensure that operational procedures are in effect.

Local governments must:

- o Attend to the immediate emergency;
- o Notify appropriate authorities; and
- o Take containment action.



ATTORNEY GENERAL OF MISSOURI

WILLIAM L. WEBSTER
ATTORNEY GENERAL

JEFFERSON CITY

65102

August 4, 1988

P. O. Box 899
(314) 751-3321

OPINION LETTER NO. 7-88

Michael Reagen, Ph.D., Director
Department of Social Services
Post Office Box 1527
Jefferson City, Missouri 65102

Dear Dr. Reagen:

This opinion letter is in response to the following questions:

(1) The Older Americans Act of 1965, 42 U.S.C. Section 3001, et seq., authorized the creation of Area Agencies on Aging (AAA's) by the designated State Agency (in Missouri the Department of Social Services, Division of Aging (DOSS/DOA)) and vested the State Agency with certain powers and authority under the Act. What is the extent of DOSS/DOA authority under the Act (and any other federal or state authority) to govern and administer the AAA's, to include direct intrusion into and the superseding of AAA governing board decisions and defining or redefining existing AAA structure and organization, and does DOSS/DOA gain any additional authority by virtue of the fact it awards Title XX Social Services Block grants, U.S. Department of Agriculture or Missouri General Revenue funds to AAA's?

(2) To what extent, if any, does the nature of the AAA's in question (i.e., as not-for-profit corporations, units of local government, subdivisions of local government, or as units of a regional council of governments) affect the answer to question (1) above, or render the authority of DOSS/DOA subordinate to that of the AAA board of directors in that regard? See 42 U.S.C. Section 3025(c).

Michael Reagen, Ph.D., Director

These questions concern a system established by federal and state statutes and regulations to aid elderly and handicapped individuals by means of funding, information gathering, analysis, planning, training and coordination and provision of resources and activities and projects. See Title III of the Older Americans Act, 42 U.S.C. Sections 3021 to 3030; Sections 660.050 to 660.057, RSMo; and the implementing regulations at 45 C.F.R. Part 1321 and 13 CSR 15-4.010 to 4.300.

Under Subchapter III of Chapter 35, 42 U.S.C. Section 3001 et seq., the federal government, through the Administration on Aging, provides funds to the state of Missouri through a single state agency to be designated by the state pursuant to 42 U.S.C. Section 3025(a)(1). The state of Missouri has designated the Division of Aging of the Department of Social Services as that agency. Section 660.050.2(11), RSMo 1986. In order to receive federal funds, the state must comply with the requirements of 42 U.S.C. Section 3025 which include, among other things, the state being divided into distinct planning and service areas (42 U.S.C. Section 3025(a)(1)(E) and 45 C.F.R. Sections 1321.9(d) and 1321.43) and designating "a public or private nonprofit agency or organization as the area agency on aging for such area" (42 U.S.C. Section 3025(a)(2)(A); 45 C.F.R. Sections 1321.45 and 1321.57; and 13 CSR 15-4.070(1)).

42 U.S.C. Section 3025(c) and 13 CSR 15-4.070(2) and (3) describe what type of agencies can be designated as area agencies on aging. In selecting the area agency on aging for each of the planning and service areas, the Division of Aging must determine as adequate the assurance by the proposed area agency "that the area agency will have the ability to develop an area plan and to carry out, directly or through contractual or other arrangements, a program in accordance with the plan within the planning and service area." 42 U.S.C. Section 3025(c). 42 U.S.C. Section 3027(a) requires further assurances be made by the state agency concerning the organization and administration of the area agency on aging. The Older Americans Act and the regulations promulgated thereunder make no provision for the state agency to enforce its responsibilities vis-a-vis the area agency on aging except to monitor and evaluate its activities and to withdraw the designation of area agency on aging pursuant to 45 C.F.R. Section 1321.39(a) which provides:

(a) In carrying out section 305 of the Act, a State must withdraw the area agency designation whenever it, after reasonable notice and opportunity for a hearing, finds that --

Michael Reagen, Ph.D., Director

(1) An area agency does not meet the requirements of this part;

(2) An area plan or plan amendment is not approved; or

(3) There is substantial failure in the provisions or administration of an approved area plan to comply with any provision of the Act or of this part.

However, 45 C.F.R. Section 1321.5(b) makes the provisions of 45 C.F.R. Part 74 - Administration of Grants, except Subpart N, applicable to the administration of the grants under the Older Americans Act. Relevant to your question is 45 C.F.R. Section 74.7 which provides:

(a) Without regard to the deviation control procedures of § 74.6, special grant conditions more restrictive than those prescribed in this Part 74 may be imposed as needed when the granting agency has determined that the grantee:

(1) Is financially unstable,

(2) Has a history of poor performance, or

(3) Has a management system which does not meet the standards of this part.

(b) When special conditions are imposed under paragraph (a) of this section, the grantee will be notified in writing:

(1) Why the special conditions were imposed and

(2) What corrective action is needed.

Furthermore, in accordance with OMB Circulars A-102 and A-110, OMB and other Federal agencies in a granting relationship with the grantee will be provided copies of the notice to the grantee.

Michael Reagan, Ph.D., Director

(c) Grantees may apply the provisions of paragraphs (a) and (b) of this section to their subgrantees. Whenever they do so, a copy of the notice to the subgrantee shall be furnished to the granting agency.

State law also makes provisions regarding the responsibilities of the Division of Aging and the local area agencies on aging. According to Section 660.053(1), RSMo Supp. 1987, an area agency on aging is:

(1) . . . the agency designated by the division [of Aging] in a planning and service area to develop and administer a plan and administer available funds for a comprehensive and coordinated system of services for the elderly and handicapped persons who require similar services.

Furthermore, Section 660.057.1, RSMo 1986, provides that "an area agency on aging shall operate with local administrative responsibility for Title III of the Older Americans Act, and other funds allocated to it by the division".

The legislature requires each area agency on aging to have a board which is "the local policy-making board which directs the actions of the area agency on aging under state and federal laws and regulations". (Emphasis added). Section 660.053(2), RSMo Supp. 1987. Furthermore, the board is responsible "for all actions of an area agency on aging in its jurisdiction, including, but not limited to, the accountability for funds and compliance with federal and state laws and rules." (Emphasis added). Section 660.057.1, RSMo 1986. The board must appoint a director of the agency and also appoint an advisory council. Subsections 1 and 2, respectively, of Section 660.057, RSMo 1986. Finally, the legislature specifies the duties of the area agencies on aging in subsection 3 of Section 660.057 which include planning, data gathering, needs assessment, coordination, advocacy on behalf of the aging, contracting, monitoring and evaluation of services, research and training.

The Division of Aging is the "central state agency with primary responsibility for the planning, coordination, development, and evaluation of policy, programs, and services for elderly persons in Missouri and the designated state unit on aging, as defined in the Older Americans Act of 1965". Section 660.050.2(11), RSMo 1986. The Division must determine "area agencies on aging annual allocations for Title XX and Title III of the Older Americans Act expenditures". Section

Michael Reagan, Ph.D., Director

660.050.2(20), RSMo 1986. The Division is also to provide "technical assistance, planning and training to local area agencies on aging" as well as "assistance in applying for federal, state, and private grants and identifying new funding sources". Section 660.050.2(3) and (19), RSMo 1986. The local plan for service delivery developed by the area agency must be approved by the Division of Aging (Section 660.057.3(2), RSMo 1986, and 13 CSR 15-4.160) and the area agency must comply with the Division's requirements "for client and fiscal information, and provide to the division information necessary for federal and state reporting, program evaluation, program management, fiscal control and research needs" (Section 660.057.3(10), RSMo 1986, and 13 CSR 15-4.170 and 4.200).

Similar to 45 C.F.R. Section 1321.39, Section 660.050.4, RSMo 1986, provides in part:

4. The division may withdraw designation of an area agency on aging only when it can be shown the federal or state laws or rules have not been complied with, state or federal funds are not being expended for the purposes for which they were intended, or the elderly are not receiving appropriate services within available resources, and after consultation with the director of the area agency on aging and the area agency board. . . .

The administrative rules promulgated by the Department of Social Services make further specific requirements of the area agencies on aging, their boards, directors and staff. See 13 CSR 15-4.100, 4.120, 4.130 and 4.140 to 4.300. The provisions of Section 660.050.4 are mirrored in 13 CSR 15-4.080 which provides in part:

(1) The division may withdraw an area agency's designation if --

(A) The area agency does not comply with requirements of the federal and state laws or rules;

(B) State or federal funds are not being expended for the purposes for which they were intended; and

Michael Reagen, Ph.D., Director


(C) Elderly persons are not receiving appropriate services within available resources.

--
In answer to your questions, 45 C.F.R. Section 74.7 provides authority for the subgrantor to impose special grant conditions upon the recipient of a subgrant. This would apply in regard to the Older Americans Act in which the DOSS/DOA is the subgrantor and the local AAA is a subgrantee. To what extent the special conditions can allow for "direct intrusion into and the superseding of AAA governing board decisions and defining or redefining existing AAA structure and organization" is difficult to answer in the abstract. As a general rule, any AAA which is a subdivision or unit of local government cannot by contract delegate away its governmental powers. Both its structure and the decision-making powers of its governing body are established by law and cannot be changed by contract.

In regard to a private not-for-profit corporation, the law provides that such is governed by a board of directors or an executive committee appointed by the board. Sections 355.130 and 355.155, RSMo 1986. The board cannot delegate its essential management responsibilities and powers to an outside party, at least not in such a way that the board loses control of the management of the corporation. Jones v. Williams, 139 Mo. 1, 40 S.W. 353, 372-373 (1897). In the same vein, corporate officers who have had delegated to them management functions, cannot delegate their discretionary powers to others. Clay v. Brown, 148 Mo.App. 541, 128 S.W. 803 (St.L. Ct.App. 1910).

Therefore, as a general rule, this office concludes that neither a local governmental entity nor a not-for-profit corporation which is designated as a AAA can, in exchange for receiving a grant of government money, delegate to DOSS/DOA the power to make governmental or managerial decisions which countermand decisions made by the governing body or officers of that entity.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General

Michael Reagen, Ph.D., Director

¹The text of the administrative rules promulgated by the Department of Social Services is located at Vol. 11, Missouri Register, pages 247 to 279 as revised at Vol. 11, Missouri Register, pages 806 to 812 with Orders of Rulemaking at Vol. 11, Missouri Register, page 806 and Vol. 11, Missouri Register, page 910. The former rules at 13 CSR 15-6 were rescinded at Vol. 11, Missouri Register, pages 812 to 813.



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December 22, 1988

OPINION LETTER NO. 11-88

Frank V. DiMaggio
Ste. Genevieve County Prosecuting Attorney
Post Office Box 406
Ste. Genevieve, Missouri 63670

Dear Mr. DiMaggio:

This opinion letter is in response to your question asking:

May Ste. Genevieve County, while generally providing a plan of hospital and medical insurance for its employees, allow those employees covered by some other hospital and medical insurance to elect to receive from the county the monetary equivalent of their participation in the county plan?

Your question makes reference to state audits declaring this practice improper with respect to certain elected county officials. In State Auditor's Report No. 84-72, September 28, 1984, Ste. Genevieve County, Missouri, Three Years Ended December 31, 1983, and again in State Auditor's Report No. 86-115, December 12, 1986, Ste. Genevieve County, Missouri, Two Years Ended December 31, 1985, the auditor recommended that the county seek reimbursement from officials who received the monetary equivalent of participation in the county plan. The auditor concluded this amount received by these officials exceeded the amounts established by statute for compensation.

Section 49.278, RSMo 1986 provides:

49.278. Governing body may provide insurance for county employees, procedure.--1. The county governing body in all counties may contribute to the cost of a plan, including a plan underwritten by insurance, for furnishing all or a part of

Frank V. DiMaggio

hospitalization or medical expenses, life insurance, or similar benefits for elected officials and their employees, and to appropriate and utilize its revenues and other available funds for these purposes.

2. No contract shall be entered into by the county to purchase any insurance policy or policies pursuant to the terms of this section unless such contract shall have been submitted to competitive bidding and such contract be awarded to the lowest and best bidder.

We note that your question concerns county employees while the auditor's reports referred to certain elected county officials. There is an important distinction since the Missouri statutes establish the procedure for determining the amount of compensation to be paid to the county officials referred to in the auditor's reports. See Section 50.333, RSMo Supp. 1988.

With respect to the county officials referred to in the auditor's reports, it is well settled that "the right to compensation for the discharge of official duties is purely a creature of statute." Crites v. Huckstep, 619 S.W.2d 328, 330 (Mo.App. 1981). Accordingly, "a public officer claiming compensation for official duties must rely on a statute authorizing payment." State ex rel. Igoe v. Bradford, 611 S.W.2d 343, 350 (Mo.App. 1980). Statutes which grant public officials compensation are strictly construed against them. Smith v. Pettis County, 345 Mo. 839, 136 S.W.2d 282, 285 (1940).


Section 49.278 does not authorize the payment of monetary compensation in lieu of participation in the county insurance plan. The compensation of the county officials referred in auditor's reports is specifically provided by statute. In the absence of statutory authorization, we conclude the county officials whose salaries are specified by statute may not receive monetary compensation in lieu of participation in the county hospital and medical insurance plan.

With respect to county employees whose salaries are not set by statute, there is no state statutory prohibition on the county paying to an employee who chooses not to be covered by the county insurance plan an amount in excess of that paid to an employee who chooses to be covered by the county insurance plan. We therefore conclude that under state statutes the county may pay employees who do not choose to be covered by the

Frank V. DiMaggio

county hospital and medical insurance plan an amount in excess of that paid employees who do choose to be covered by the county insurance plan, which additional amount is the monetary equivalent of participation in the county insurance plan.

Very truly yours,

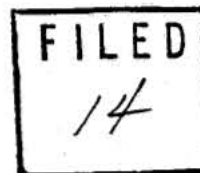

WILLIAM L. WEBSTER
Attorney General

COUNTIES: A county is authorized to expend
COUNTY ROADS: a portion of its sales tax
COUNTY SALES TAX: revenue derived from the tax
ROADS: authorized by Section 67.700,
ROAD DISTRICTS: RSMo 1986, for maintenance of
TAXATION -- COUNTY SALES TAX: roads in special road districts,
which roads are not state
highways and which roads form a part of the county network of
roads, either directly or by means of a contract with the
special road district which contract complies with the provi-
sions of Article VI, Section 16, Missouri Constitution of 1945,
and Sections 70.210 to 70.320, RSMo 1986.

February 25, 1988

OPINION NO. 14-88

The Honorable John A. Birch
Representative, District 31
State Capitol Building, Room 236A
Jefferson City, Missouri 65101



Dear Representative Birch:

This opinion is in response to your question asking:

Is it legally permissible for Platte County
to expend a portion of its sales tax revenue
derived from Section 67.700, RSMo 1986, for
the maintenance of roads in a special road
district?

Sections 67.700 to 67.727, RSMo 1986, set up provisions
regarding a capital improvements sales tax for certain counties
including the county of Platte. The only provisions within
those sections describing the use to which these sales tax
revenues may be put are as follows:

1. Any county, as defined in section
67.724, may, by ordinance or order, impose
a sales tax on all retail sales made in
such county which are subject to taxation
under the provisions of sections 144.010 to
144.510, RSMo, for any capital improvement
purpose designated by the county in its
ballot of submission to its voters;
[Section 67.700.1.]

2. Any county imposing a sales tax
pursuant to the provisions of sections

The Honorable John A. Birch

67.700 to 67.727 may contract with any other county or with any city for the construction, maintenance, or utilization of any facility or project funded in whole or in part from revenues derived from the tax levied pursuant to the provisions of sections 67.700 to 67.727. [Section 67.727.2.]

The first issue is whether the fact that the roads are in a special road district precludes the use of the tax revenues for their maintenance. The tax revenues may be spent on those roads in special road districts which are not state highways and which form a part of the county network of roads. Attorney General Opinion No. 36, Parish, January 18, 1968, a copy of which is enclosed. Furthermore, Platte County also has the legal authority to enter into contracts with other political subdivisions, such as special road districts, for the "planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law." Article VI, Section 16, Missouri Constitution of 1945. The legislature has implemented this provision with Sections 70.210 to 70.320, RSMo 1986. In Attorney General Opinion No. 4, Evans, December 9, 1966, a copy of which is enclosed, this office opined that, under these statutes, "the county court, acting for a county can contract with a special road district for maintenance of the public roads in such road district," Id. at p. 3.

We do not find any language in Sections 67.700 to 67.727 which limits the authority of the county to expend its tax revenues on roads in special road districts by these two methods. Therefore, Platte County can directly expend revenues derived under Section 67.700 for the maintenance of roads in a special road district as long as those roads are not state highways and form a part of the county network of roads; and, the county has the authority to enter into a contract for the expenditures of monies for maintenance of those roads as long as the provisions of Article VI, Section 16, Missouri Constitution of 1945, and Sections 70.210 to 70.320, RSMo 1986, are complied with.

The second issue for resolution is whether sales tax revenues limited by Section 67.700.1 to be used "for any capital improvement purpose" may be used for "maintenance" of public roads. There are no definitions of "capital improvement" or "maintenance" provided in Sections 67.700 to 67.727. Therefore, these words must be taken "in their plain or ordinary and usual sense,". Section 1.090, RSMo 1986. In determining the

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plain, ordinary or usual meaning of these terms, courts have found that there is a difference between "capital improvements" and "maintenance". City of Temple v. Fulton, 430 S.W.2d 737, 742 (Civ.App.Tex. 1968) (holding that while the purchase of a right-of-way for a highway was a capital improvement, maintenance of a road was not); Leavitt v. Town of North Hampton, 98 N.H. 193, 96 A.2d 554, 556 (1953) ("In the absence of any definition of a capital improvement as used in the act the term 'capital improvement' must be taken in its ordinary sense of a permanent improvement or betterment as distinguished from ordinary repair or current maintenance."); City of Juneau v. Hixson, 373 P.2d 743, 747 (Alaska 1962) ("'Capital', therefore, seems generally to be associated with value represented by real or personal property in some form and with relative permanency. 'Improvement' in its broad sense means betterment. . . . We believe 'capital' was used in the sense in which it is associated with assets in the form of real or personal property and that it was intended to connote a degree of permanency. We believe that it includes the 'public works of a permanent character' such as 'streets, bridges, wharves and harbor facilities'); and Wright v. City of Palmer, 468 P.2d 326, 329-330 (Alaska 1970) (reaffirming the holding in City of Juneau, *supra*). These court holdings comport with the definitions provided in Webster's Third New International Dictionary which are as follows:

Improvement . . . 1.c: the enhancement or augmentation of value or quality: an increasing of profitableness, excellence, or desirability . . . 2.b: an instance of such improvement: something that improves in this way as (1): a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs -- [p. 1138.]

Maintenance . . . 4: the labor of keeping something (as buildings or equipment) in a state of repair or efficiency. [p. 1362.]

It is significant that the legislature described the general uses to which the sales tax revenues may be put with the phrase "for any capital improvement purpose" as opposed to the phrase "for capital improvements". The former phrase has a much broader meaning and is understood by this office to include

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maintenance of a capital improvement. The term "any", which modifies "purpose", ordinarily is all inclusive and means "every" or "all". State ex rel. Union Electric Light & Power Co. v. Public Service Commission of Missouri, 337 Mo. 419, 84 S.W.2d 905, 908 (1935). Furthermore, the words "any capital improvement" modify the word "purpose". General phrases using the word "purpose" have been given broad interpretation by Missouri courts. In a dispute involving the distinction between the terms "erecting public buildings" and "building purposes," the Missouri Supreme Court stated:

The term "erecting public buildings" as used in the Constitution [Article X, Section 11, Missouri Constitution of 1875] is less comprehensive than the term "building fund" or "building purposes" as used in the statutes, and the excess levy under the Constitution must be solely and specifically "for erecting school buildings. . . ." An increased tax rate, that is, an increase above the ordinary 40-cent rate allowed without a vote, may well be voted for building purposes, which may include any repairs, alterations, or furnishing of school buildings, or even for purchasing building sites or buildings themselves. . . . [State ex rel. Marlowe v. Himmelberger-Harrison Lumber Co., 332 Mo. 379, 58 S.W.2d 750, 753-754 (1933).]

In another case, the same court held that the phrase "school purposes" included construction of buildings and additional classrooms as well as the operation and maintenance of schools. "The unfettered term, 'school purposes,' connotes an all-inclusive meaning" Rathjen v. Reorganized School District R-II of Shelby County, 284 S.W.2d 516, 524 (Mo. banc 1955). In the course of the opinion, the court quoted with approval a holding in Board of Commissioners of Roads & Revenues of Twiggs County v. Bond, 203 Ga. 558, 47 S.E.2d 511, 512: "On the other hand, the term, 'for educational purposes,' is broad enough to cover all things necessary or incidental to the furtherance of education," Quoted in Rathjen, supra, at 522.

In light of the above, the language in Section 67.700.1 can be interpreted to include purposes such as maintenance which preserve or further the use of capital improvements. Supportive of this interpretation is the language in Section 67.727 which

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relates to the use of the tax revenues authorized under Section 67.700:

2. Any county imposing a sales tax pursuant to the provisions of sections 67.700 to 67.727 may contract with any other county or any city for the construction, maintenance, or utilization of any facility or project funded in whole or in part from revenues derived from the tax levied pursuant to the provisions of sections 67.700 to 67.727. [Emphasis added.]


Even though this section relates to contracts with other counties and cities, it is not logical to infer that the legislature would have intended to limit to only those entities the use of the tax revenues for "construction, maintenance and utilization." Such an interpretation would mean that these uses would be denied to the very counties who imposed the sales tax and received the tax revenues. Rather, the enactment of this section together with Section 67.700.1 is an indication that the legislature understood the phrase "for any capital improvement purpose" in a broad sense and to include maintenance of capital improvements.

Therefore, tax revenues received under Section 67.700 may be used for the maintenance of capital improvements, including roads, as well as for their construction and utilization.

Conclusion

It is the opinion of this office that a county is authorized to expend a portion of its sales tax revenue derived from the tax authorized by Section 67.700, RSMo 1986, for maintenance of roads in special road districts, which roads are not state highways and which roads form a part of the county network of roads, either directly or by means of a contract with the special road district which contract complies with the provisions of Article VI, Section 16, Missouri Constitution of 1945, and Sections 70.210 to 70.320, RSMo 1986.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General

The Honorable John A. Birch

Enclosures:

Attorney General Opinion No. 4, Evans, December 9, 1966

Attorney General Opinion No. 36, Parish, January 18, 1968.



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

June 15, 1988

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 731-3321

OPINION LETTER NO. 19-88

C. Keith Schafer, Ed.D.
Director, Department of Mental Health
Post Office Box 687
Jefferson City, Missouri 65102



Dear Dr. Schafer:

This opinion letter is in response to your question asking:

Do the confidentiality provisions contained in Section 630.140, RSMo 1986, preclude the Department of Mental Health from divulging account information to an agency which will assist in the collection of delinquent accounts of persons who have been or are being treated, habilitated or rehabilitated by the Department of Mental Health?

We understand that your question concerns the responsibility imposed upon the director of the Department of Mental Health to charge fees for services rendered patients, residents and clients of the Department, pursuant to Sections 630.205 through 630.220, RSMo 1986.

The confidentiality provision, Section 630.140, RSMo 1986, provides in part as follows:

630.140. Records confidential, when -- may be disclosed, to whom, how, when -- release to be documented -- court records confidential, exceptions. -- 1. Information and records compiled, obtained, prepared or maintained by the residential

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facility or day program operated, funded or licensed by the department or otherwise in the course of providing services to either voluntary or involuntary patients, residents or clients shall be confidential.

"Account information" which pertains to "delinquent accounts of persons who have been or are being treated, habilitated or rehabilitated by the Department of Mental Health", as set forth in your inquiry, would be included in Section 630.140.1, RSMo 1986. Such information shall be confidential, although certain limitations or exceptions are provided in following subsections of the statute. The statute does not contain a specific exception addressed by your question. The absence of such a specific exception, however, does not preclude the Department from sharing such account information with an agency which will assist in the collection of delinquent funds. The Department may bind such an agency, by contract, and as the Department's agent, subject to the Department's control, to the confidentiality provisions of Section 630.140, RSMo 1986.

An "agency" relationship is determined by the right of control by the principal. Scott v. Ford Motor Credit Corp., 706 S.W.2d 453, 460 (Mo. App. 1985). The agent's acts are binding upon the principal to the extent that they are within the authority, actual or apparent, granted by the principal. Hyken v. Travelers Insurance Company, 678 S.W.2d 454, 457 (Mo. App. 1984). It has long been held that a principal is liable for torts or other wrongful acts committed by the agent in transaction of the business of the agency. Doyle v. Scott's Cleaning Co., 224 Mo. App. 1168, 31 S.W.2d 242, 245 (1930).


The Department should maintain strict control over the agency with respect to the manner of performance, and, most specifically, with respect to the use of client, patient or resident account information. The authority granted the agent should be carefully delineated, and the representations made by the agent on behalf of the principal should be closely monitored.

We believe the Department, in entering into any agreement with an agency to collect delinquent accounts, must exercise extreme care to protect the confidentiality of patients, residents and clients. That is to say, that the Department should

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take all precautions to assure that the agency rendering assistance to the Department to collect debts is bound by the same duty of confidentiality as required of the Department by Section 630.140, RSMo 1986. Accordingly, the Department would not be precluded from sharing account information with such an agent.

Very truly yours,

A handwritten signature in dark ink, appearing to read "William L. Webster", written in a cursive style.

WILLIAM L. WEBSTER
Attorney General

CAMPAIGN EXPENDITURES: While a school district is not a
CAMPAIGN FINANCE REVIEW BOARD: "committee" as that term is
SCHOOLS: defined in Section 130.011(7),
SCHOOL DISTRICTS: RSMo 1986, it is a "person" as
that term is defined in Section
130.011(18), RSMo 1986, and is subject to certain disclosure
requirements in the Campaign Finance Disclosure Law.

March 2, 1988

OPINION NO. 21-88

The Honorable Jim Murphy
Representative, District 95
State Capitol Building, Room 106-A
Jefferson City, Missouri 65101



Dear Representative Murphy:

This opinion is in response to your question asking:

Are school districts which use time, equipment and personnel to support or oppose a ballot issue required to file campaign disclosure statements, pursuant to chapter 130, RSMo?

The Campaign Finance Disclosure Law provides a complex set of public disclosure requirements in Chapter 130, RSMo 1986. The law typically describes those who are subject to or exempt from these requirements as being a "candidate", "committee", "connected organization", "labor organization", "person", "political party", and "political party committee". The law provides definitions for those and other terms in Section 130.011, RSMo 1986. Without setting forth the definitions of all the above-referenced terms, we find that school districts fit only within the definition of "persons" as that definition is set forth in Section 130.011(18), RSMo 1986:

(18) "Person", an individual, group of individuals, corporation, partnership, committee, proprietorship, joint venture, any department, agency, board, institution or other entity of the state or any of its political subdivisions, union, labor organization, trade or professional or business association, association, political party or any executive committee thereof, or any

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other club or organization however constituted or any officer or employee of such entity acting in his official capacity; [Emphasis added.]

The underlined provision is basically the same as a provision in Section 130.011(7), RSMo 1986, excluding these same entities from the definition of "committee". Section 130.011(7) defining "committee" provides:

(7) "Committee", a person or any combination of persons, who accepts contributions or makes expenditures for the primary or incidental purpose of influencing or attempting to influence the action of voters for or against the nomination or election to public office of one or more candidates or the qualification, passage or defeat of any ballot measure or for the purpose of paying a previously incurred campaign debt or obligation of a candidate or the debts or obligations of a committee or for the purpose of contributing funds to another committee; except that, a person or combination of persons, as described in this subdivision, shall not be deemed to be a committee if . . . ; nor shall any department, agency, board, institution or other entity of the state or any of its subdivisions or any officer or employee thereof, acting in his official capacity, be deemed a committee. . . . [Emphasis added.]

The above-quoted language in the definitions of "committee" and "person" encompasses school districts since they are political subdivisions of the state. Hughes v. Civil Service Commission of City of St. Louis, 537 S.W.2d 814, 815 (Mo.App. 1976). Therefore, sections of the Campaign Finance Disclosure Law which place disclosure requirements only on "committees" are not applicable to school districts but those placing requirements on "persons" are applicable unless otherwise indicated by statutory language or context.

For example, the requirements of subsection 1 of Section 130.051, RSMo 1986, apply to school districts:

130.051. Expenditures reported, when
-- contents of report -- exceptions --
internal dissemination, when reported--

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reports of out-of-state committees -- other committee disclosure reports. 1. Any person who is not a defined committee who makes an expenditure or expenditures aggregating five hundred dollars or more in support of or opposition to one or more candidates or in support of or in opposition to the qualification or passage of one or more ballot measures, other than a contribution made directly to a candidate or committee, shall file a report signed by the person making the expenditure, or that person's authorized agent, disclosing the name and address of the person making the expenditure, the date and amount of the expenditure or expenditures, the name and address of the payee, and a description of the nature and purpose of each expenditure. Such report shall be filed with the appropriate officer for the candidate or ballot measure in question as set forth in section 130.026 within fourteen days after the date of making an expenditure which by itself or when added to all other such expenditures during the same campaign equals five hundred dollars or more. If, after filing such report, additional expenditures are made, a further report shall be filed at the date set forth in section 130.046 for any reporting period in which the additional expenditures are made; except that, if any such expenditure amounting to five hundred dollars or more is made within fourteen days prior to an election, the report shall be filed within forty-eight hours after the date of such expenditure. The provisions of this subsection shall not apply to a person who uses only its funds or resources to make an expenditure or expenditures in support of or in coordination or consultation with a candidate or committee, provided that any such expenditure is recorded as a contribution to that candidate or committee and so reported by the candidate or committee being supported by the expenditure or expenditures.

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Having determined that Section 130.051.1 is applicable to school districts, the next issue is whether disclosure statements are required in regard to the use of time, equipment and personnel to support or oppose a particular ballot issue. The disclosure requirements of Section 130.051.1 are triggered by "an expenditure or expenditures" over a certain value. Therefore, whether these disclosure requirements are applicable depends on whether the school district made an "expenditure" as that term is defined in Section 130.011(13), RSMo 1986. This subsection provides in pertinent part as follows:

(13) "Expenditure", a payment, advance, conveyance, deposit, donation or contribution of money or anything of value for the purpose of supporting or opposing . . . the qualification or passage of any ballot measure or for the support of any committee which in turn supports or opposes any . . . ballot measure An expenditure of anything of value shall be deemed to have a money value equivalent to the fair market value. [Definition goes on to give non-exhaustive examples of what may be included and excluded in the term "expenditure".]

The definition of the term "expenditure" is broadly worded and includes more than simply providing money. It includes the "donation or contribution of . . . anything of value" There can certainly be instances in which the provision of personal services and use of equipment would be considered things of value. However, much may depend on the exact circumstances and your request does not provide any detailed description of the manner in which the personnel or equipment are used. Therefore, it is impossible to provide any detailed advice in this opinion. A school district, with its counsel, will have to compare the district's conduct with the relevant portions of the Campaign Finance Disclosure Law to determine on a case-by-case basis whether the expenditure level has been met.

Another example of a provision applicable to school districts is found in subsection 2 of Section 130.051 which provides:

2. The internal dissemination by any membership organization, proprietorship, labor organization, corporation, association or other entity, except a committee as defined in section 130.011, of

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information advocating the election or defeat of a candidate or the passage or defeat of a ballot measure to its members, employees or shareholders, the cost of which is more than two thousand dollars in support of or in opposition to one or more candidates or in support of or in opposition to the qualification or passage of one or more ballot measures in a calendar year, other than a contribution made directly to a candidate or committee, shall be reported in a report signed by the person responsible for making the expenditure, or that person's authorized agent, disclosing the name and address of the person making the expenditure, the date and amount of the expenditure or expenditures, the name and address of the payee, and a description of the nature and purpose of the dissemination of information. Such report shall be filed with the appropriate officer for the candidate or ballot measure in question as set forth in section 130.026 within fourteen days after the date of making an expenditure. If, after filing such report, additional expenditures are made, a further report shall be filed at the date set forth in section 130.046 for any reporting period in which the additional expenditures are made; except that, if any such expenditure amounting to five hundred dollars or more is made within fourteen days prior to an election, the report shall be filed within forty-eight hours after the date of such expenditure. [Emphasis added.]

The term "other entity" would include school districts. "Entity" is not defined in Chapter 130 and so should be taken in its "ordinary and usual sense". Section 1.090, RSMo 1986. 30 C.J.S. Entity, p. 722, defines the term as follows:

The word "entity" has elastic application, and is variously defined as meaning a real being; existence; a real being, whether in thought (as in ideal conception) or in fact; something which has reality and distinctness of being, but that reality and distinctness may be either in fact or in thought. [Footnotes omitted.]

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As a political subdivision, a school district has a real and distinct existence. Hughes v. Civil Service Commission of City of St. Louis, supra. Therefore, a school district would come within the provisions of subsection 2 of Section 130.051.

The above is not meant to be an exhaustive listing of the provisions in Chapter 130 applicable to school districts. School districts are best advised to examine the particular circumstances involved in each instance in which they wish to work for or against a ballot proposal and, with their counsel, engage in a close analysis of the Campaign Finance Disclosure Law in order to ensure full compliance.

CONCLUSION

It is the opinion of this office that while a school district is not a "committee" as that term is defined in Section 130.011(7), RSMo 1986, it is a "person" as that term is defined in Section 130.011(18), RSMo 1986, and is subject to certain disclosure requirements in the Campaign Finance Disclosure Law.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General

¹This opinion does not address whether it is legally permissible for a school district to use time, equipment and personnel to support or oppose a ballot issue.

COUNTIES:

COUNTY COMMISSIONS:

COUNTY COMMISSIONERS:

COUNTY COURTHOUSE:

(1) A decision by the county

commission to close the

courthouse would be beyond its

authority and thus void;

however, the commission is not

prohibited from reducing the number of hours each day the

courthouse is open to the public, and (2) the county

commission's failure to pay elected officials does not alleviate

or affect the county's obligation to pay them.

July 27, 1988

OPINION NO. 22-88

Mr. Winston Buford
Shannon County Prosecuting Attorney
Post Office Box 429
Eminence, Missouri 65466

Dear Mr. Buford:

This opinion is in response to your questions asking:

QUESTION NO. 1: Can the county
commissioners order the closing of the
courthouse doors?

QUESTION NO. 2: Can the county
commissioners cease paying elected county
officials?

QUESTION NO. 1

Section 49.310, RSMo 1986, requires the county commission (formerly called the county court) to erect and maintain a courthouse at the established county seat, stating in pertinent part:

The county commission in each county in this state shall erect and maintain at the established seat of justice a good and sufficient courthouse, . . .

The county commission's powers are limited and defined by statute and whenever the county steps outside of and beyond this authority its acts are void. Browning-Ferris Industries of Kansas City, Inc. v. Dance, 671 S.W.2d 801, 808 (Mo. App. 1984). Accordingly, the county commission must keep the courthouse doors open. A "county courthouse" is a building

Winston Buford

wherein courts are held and records kept and county officers maintain their offices and perform their function at the county seat. Odell v. Pile, 260 S.W.2d 521, 524 (Mo. 1953). The public must have reasonable access to the county's official records, as well as the circuit court's official records, and reasonable access to the offices of the county officials for conducting county and court business. However, we find no law prohibiting a commission from reducing the number of hours each day the courthouse is held open to the public for conducting county and court business.

QUESTION NO. 2

Section 50.330, RSMo 1986, requires payment of county officials' salaries: "Any salary provided for a county officer, deputies and assistants, shall be paid in monthly installments on the first day of each month, by warrants drawn on the county treasury." (Emphasis added). The salary of the elected county officials is determined by statute enacted by the legislature, which amounts to a mandate to the county commission to budget such amounts. Failure to do so does not prevent the creation of the obligation. The legislature has created the obligation by statute, and such obligations imposed by the legislature have priority over other such items as to which the county commission has discretion to determine whether or not such obligation should be incurred. To permit public officials elected or appointed to receive, by agreement or otherwise, a less compensation for their services than fixed by law, would be contrary to "public policy" of the state. Reed v. Jackson County, 142 S.W.2d 862, 865 (Mo. 1940).

The Missouri Supreme Court noted in Gill v. Buchanan County, 142 S.W.2d 665 (Mo. 1940) that:

Failure to budget funds for the full amount of salaries due officers of the county, under the applicable law, which the county court must obey cannot bar the right to be paid the balance.

Id., 142 S.W.2d at 668.


In view of Section 50.330, RSMo 1986, and the above-cited court decisions, it is clear that to permit public officers, elected or appointed, to receive, by agreement or otherwise, a less compensation for their services than fixed by law, would be contrary to the public policy of the state.

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Conclusion

It is the opinion of this office that: (1) a decision by the county commission to close the courthouse would be beyond its authority and thus void; however, the commission is not prohibited from reducing the number of hours each day the courthouse is open to the public, and (2) the county commission's failure to pay elected officials does not alleviate or affect the county's obligation to pay them.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

August 3, 1988

OPINION LETTER NO. 23-88

Martin Mazzei
Crawford County Prosecuting Attorney
201 Main Street
Steelville, Missouri 65565

Dear Mr. Mazzei:

This opinion letter is in response to your question asking what, if any, authority a third class county has to enact an ordinance regulating the use of county roads, canoe and boat rental businesses and waterways within the county. While this office does not pass upon the validity of particular ordinances, this opinion will address the authority of counties to enact ordinances regulating the particular type of conduct set out in your question.

Counties generally have only the authority to enact ordinances pursuant to those powers expressly delegated to them by the legislature, or implied powers, as stated in the following:

. . . [C]ounties, like other public corporations "can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation -- not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied."

Lancaster v. County of Atchison, 180 S.W.2d 706, 708 (Mo. banc 1944) quoting Dillon on Municipal Corporations, 3rd Ed., Section 89.

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In a later Missouri case, Everett v. County of Clinton, 282 S.W.2d 30 (Mo. 1955), the court did find implied power. The test for finding implied power was defined in that case as a power "essential to effectuate the purpose manifested in an express power or duty, conferred, or imposed upon the county by statute." Id., 282 S.W.2d at 37. Everett concerned a third class county having the right to acquire, own and control a rock quarry and the express power to construct roads. The court held these rights included implicitly:

. . .[t]he right to use and operate the quarry for county purposes and to mine, prepare and use such material on the public roads of the county. While it is true that the law is strict in limiting the authority of county courts, "it never has been held that they have no authority except what the statutes confer in so many words. The universal doctrine is that certain incidental powers germane to the authority and duties expressly delegated and indispensable to their performance may be exercised.

Id., 282 S.W.2d at 37, quoting Blades v. Hawkins, 240 Mo. 187, 197, 112 S.W. 979, 982 (1908).

These tests may be applied to your question as follows:

First addressed is your question concerning the regulation of traffic on county roads and bridges in Crawford County. On October 3, 1961, this office issued an opinion to Channing D. Blaeuer, then prosecuting attorney of Randolph County, answering a question concerning that county's authority to regulate parking and vehicular traffic on public roads. Then, and research reveals nothing to change the conclusion at the present, this office found no authority for a third class county to control traffic on public roads. That opinion stated:

Section 304.130, RSMo 1959, authorizes county courts in class one counties to control traffic on public roads outside of incorporated areas in such county. This appears to be the only statute authorizing any county to regulate traffic on public roads. Counties, like other public corporations, can exercise only power granted them by statute, either in express language or necessarily and clearly implied in language incident to power expressly granted. Any

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reasonable doubt concerning the existence of a power must usually be resolved against the exercise of such power. [Citations omitted.] It therefore appears that, since there is no statute expressly authorizing third class counties to exercise the power, Randolph County does not have such power.

No statutes granting authority to third class counties to regulate traffic have been enacted since that Attorney General's opinion, and, therefore, it remains valid today.

Your question next addresses a county's authority to regulate trash collection by companies renting canoes and floating devices. The County Option Dumping Ground Law, for those counties which have taken advantage of its terms, provides in Section 64.463, RSMo 1986, that:

No person shall dispose of any ashes, garbage, rubbish or refuse at any place except a disposal area licensed as provided in sections 64.460 to 64.487.

This particular section was analyzed by the Court of Appeals for the Western District of Missouri in State v. McClary, 399 S.W.2d 597 (Mo.App. 1966). That court concluded that any person violating Section 64.463 is guilty of a misdemeanor. However, whether authority to regulate solid waste disposal can be found under powers implied by Section 64.463 would probably depend on a strong factual showing that it is necessary to achieving the purposes of Section 64.463.

In the more recent case of Browning-Ferris Industries of Kansas City, Inc. v. Dance, 671 S.W.2d 801 (Mo.App. 1984), the Western District addressed the subject of controlling solid waste, and concluded this was of the highest priority and, therefore, would authorize a county to take certain actions analyzed in that opinion. In so doing, it quoted Section 260.215.2, RSMo which provided that:

Any city or county may adopt ordinances, rules, regulations, or standards for the storage, collection, transportation, processing or disposal of solid wastes which shall be in conformity with the rules and regulations adopted by the department for solid waste management systems. However, nothing in sections 260.200 to 260.245 shall usurp the legal

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right of a city or county from adopting and enforcing local ordinances, rules, regulations or standards for the storage, collection, transportation, processing, or disposal of solid wastes equal to or more stringent than the rules or regulations adopted by the department pursuant to sections 260.200 to 260.245.

The court addressed the high priority of public health as follows:

The preservation of the public health is recognized as a goal of the highest priority. Craig v. City of Macon, 543 S.W.2d 772, 773 (Mo. banc 1976). In Craig, the Supreme Court stated the legislature enacted §§ 260.200-.245 to prevent public nuisances, public health hazards, and the despoilation of the environment that necessarily accompany the accumulation and unmanaged disposal of garbage, refuse and filth. The court noted that throughout human history this menace had led to and intensified disease and plague. Therefore, the legislature, in its wisdom, has forbidden the dumping of solid waste on the ground, in streams, springs, and other bodies of water except through licensed solid waste disposal areas, and other means that do not create public nuisances or adversely affect the public health.

Browning-Ferris Industries of Kansas City v. Dance, supra, 671 S.W.2d at 808. (Emphasis supplied.)

Therefore, while no cases have been found directly in point concerning a county's authority to require trash collection by businesses renting canoes and boats, in light of the importance of preventing uncontrolled disposal of solid waste recognized by the court in Browning-Ferris, there may be at least implied authority under the County Option Dumping Ground Law or implied if not express authority under the quoted section of the solid waste disposal statute for this portion of your ordinance. The success of these arguments would no doubt depend in large part upon a factual showing of how much of a solid waste disposal problem these canoes, boats and rafts and other floating devices cause, and how important their control is to accomplish the

Martin Mazzei

purposes of the solid waste disposal law and the County Option Dumping Ground Law.

It should be noted that Section 260.215.2, RSMo, does speak of regulations for the collection of solid wastes, though that would seem to refer to regulation of a system of trash collection from homes and businesses, etc. The court in State v. McClary, supra, did indicate that it believed the operator of an unlicensed dump area "would be guilty of a misdemeanor if he aided, abetted, encouraged or solicited any other person to dispose of such wastes in such area and that person disposed of them there." However, the acts of soliciting, receiving and disposing of waste in an unlicensed dump area is considerably different than renting canoes or other boats to persons who might then litter from them. The former is a positive knowing act in violation of a law, whereas the latter only provides another with an opportunity to violate a law requiring disposal only in licensed dumps. It seems doubtful that the persons involved in the two situations would be held responsible in like manner by the law.

We find no authority, expressed or implied, to require posting of notices concerning rights of property owners. We find no authority, expressed or implied, for a county to require identification numbering of floating devices, nor identification of businesses owning these devices, unless a strong showing could be made that such identification is essential to the accomplishment of the purposes of the solid waste laws cited above.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

AMBULANCE DISTRICTS:
CONFLICT OF INTEREST:
COUNTIES:
COUNTY COMMISSIONS:
COUNTY COMMISSIONERS:
INCOMPATIBILITY OF OFFICES:

The same person may not simultaneously hold the office of presiding commissioner of the county commission and the office of member of the board of directors of an ambulance district within that county.

February 11, 1988

OPINION NO. 25-88

The Honorable Stephen R. Waters
Representative, District 1
State Capitol Building, Room 135 A-B
Jefferson City, Missouri 65101



Dear Representative Waters:

This opinion is in response to your question asking:

Can a Clark County elected official also hold a position with the Clark County Ambulance District without a conflict of interest?

Specifically, you are asking whether the Presiding Commissioner of the Clark County Commission can simultaneously hold office as Secretary-Treasurer of the Clark County Ambulance District. Although it is not necessary that the secretary or treasurer of an ambulance district also be a member of the board of directors, you have indicated that the subject of this request is in fact also a director. See Section 190.055.1, RSMo 1986.

There is no express constitutional or statutory provision that prohibits the presiding commissioner of the county commission from occupying the office of ambulance district director. However, it is not necessary that there be an express prohibition since the Missouri courts recognize the common law doctrine prohibiting a public officer from holding two incompatible offices at the same time.

This doctrine of incompatibility of offices is more fully discussed in Missouri Attorney General Opinion No. 2, Anderson, 1961, a copy of which is enclosed. The authorities cited in that opinion conclude that offices are incompatible when the duties and functions are inherently inconsistent and repugnant so that one person cannot discharge the duties of both offices faithfully, impartially, and efficiently. The authorities also note that it is not an essential element of incompatibility that

The Honorable Stephen R. Waters

the clash of duty exist in all or in the greater part of the official functions. 67 C.J.S. Officers § 27 (1978), states in part:

Accordingly, a conflict of interest exists where one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or has the power to remove the incumbent of the other or to punish the other. Furthermore, a conflict of interest may be demonstrated by the power to regulate the compensation of the other, or to audit his accounts.


The statutes outlining the authority and duties of the commissioners of county commissions and the directors of ambulance districts contain instances where obvious conflicts would arise if the same person were to hold such offices simultaneously. Section 190.050.1, RSMo 1986, authorizes the county commission to create and reapportion the election districts for ambulance districts. Under certain circumstances, the county commission is also authorized to fill vacancies on the ambulance district board of directors when the board is unable to do so. Section 190.052, RSMo 1986.

In light of these areas of potential conflict between the offices, we conclude that there is in fact an incompatibility and repugnancy between the office of presiding commissioner of a county commission and the office of member of the board of directors of an ambulance district within that county. As a result of such incompatibility and conflict, the same person may not hold these offices simultaneously.

Conclusion

It is the opinion of this office that the same person may not simultaneously hold the office of presiding commissioner of the county commission and the office of member of the board of directors of an ambulance district within that county.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General

Enclosure: Attorney General Opinion No. 2, Anderson, 1961

AMBULANCE DISTRICTS:
CONSTITUTION:
CONSTITUTIONAL LAW:
INVESTMENTS:

An ambulance district may not
invest in mutual fund accounts.

June 7, 1988

OPINION NO. 26-88

The Honorable Ron Stivison
Representative, District 20
State Capitol Building, Room 102BA
Jefferson City, Missouri 65101

Dear Representative Stivison:

This opinion is in response to your question asking whether the St. Charles County Ambulance District may invest in mutual fund accounts.

An ambulance district is a "body corporate and a political subdivision of the state" and is statutorily empowered to levy and collect taxes. Section 190.010.2, RSMo 1986. Article VI, Section 23 of the Missouri Constitution (1945), provides:

Section 23. Limitation on ownership of corporate stock, use of credit and grants of public funds by local governments. No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this constitution.

In interpreting this constitutional provision, consideration must be given to its purpose and a reasonable interpretation made of the language used. See Rathjen v. Reorganized School District R-II of Shelby County, 284 S.W.2d 516, 524 (Mo. banc 1955). Unless a contrary intent is shown, the meaning of language used in a constitutional provision is presumed to be its natural and ordinary meaning. Roberts v. McNary, 636 S.W.2d 332, 335 (Mo. banc 1982). Boone County Court v. State, 631 S.W.2d 321, 324 (Mo. banc 1982).

There is no evidence Missouri voters intended the language in Article VI, Section 23 of the Missouri Constitution (1945) to have other than its ordinary and commonly understood meaning. The provision's purposes, according to appellate courts of other states that have construed similar constitutional provisions,

The Honorable Ron Stivison

include keeping government out of private business, Dade County Board of Public Instruction v. Michigan Mutual Liability Company, 174 So.2d 3, 5-6 (Fla. 1965), restricting the activities and functions of political subdivisions to government and prohibiting their direct or indirect engagement in commercial enterprise for profit, Bailey v. City of Tampa, 111 So. 119, 120 (Fla. 1926), or entry into private business, State ex rel. Johnson v. Consumers Public Power Dist., 10 N.W.2d 784, 794 (Neb. 1943); Long v. Mayo, 111 S.W.2d 633, 635 (Ky. App. 1937).

A mutual fund has been defined as an investment company that invests money of its shareholders in a (usually) diversified group of securities of other corporations. Websters New Collegiate Dictionary, 1977. It would be inconsistent with Article VI, Section 23 of the Missouri Constitution to permit an ambulance district to invest in such fund.

Conclusion

It is the opinion of this office that an ambulance district may not invest in mutual fund accounts.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

CITIES, TOWNS AND VILLAGES:
LICENSE FEES:
LICENSE TAX:
LICENSES:
THIRD CLASS CITIES:

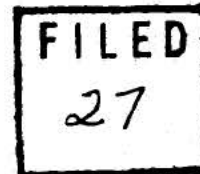
A city of the third class is not authorized to levy and collect a license tax on electricians, and a city of the third class is not authorized to regulate the

business of electricians by requiring electricians to first obtain a license, the issuance of which is conditioned on the electrician satisfactorily passing a proficiency exam.

July 27, 1988

OPINION NO. 27-88

John D. Wiggins
Phelps County Prosecuting Attorney
Phelps County Courthouse
Rolla, Missouri 65401



Dear Mr. Wiggins:

This opinion is in response to your questions asking:

1. May a city of the third class lawfully levy and collect a license tax on electricians?

2. Does a city of the third class have lawful authority to regulate the business of electricians by requiring electricians to first obtain a license the issuance of which is conditioned on the electrician satisfactorily passing a proficiency exam?

In regard to the first question, the authority of a third class city to require a license fee or tax must be derived from the constitution or statute.

"A city has no inherent power to tax. This power rests primarily in the state and may be delegated by constitutional provision or by statutory enactment. The authority to tax must be expressly granted or necessarily incident to the powers conferred, and in case of doubt the power is denied." Siemens v. Shreeve, 296 S.W. 415, 416 (Mo. banc 1927).

John D. Wiggins

The authority to impose a license tax is to be strictly construed against the city. Petrolene, Inc. v. City of Arnold, 515 S.W.2d 551, 552 (Mo. 1974). Courts have interpreted these principles and the provisions of Section 71.610¹ to require that the occupation, trade or profession being subjected by ordinance to the fee or tax must be specifically named in the authorizing constitutional or statutory provision. Petrolene, Inc. v. City of Arnold, supra at 552-553; Siemens v. Shreeve, supra at 418. There must be a specific naming of the occupation in the constitutional or statutory provision providing the authority to impose the fee or tax. City of Odessa v. Borgic, 456 S.W.2d 611, 617 (Mo.App. 1970).

Insofar as third class cities are concerned, the legislature provided three separate areas of taxing or regulatory authority in Section 94.110, RSMo 1986. First, there is the authority simply to tax; second, there is the authority to impose a license tax and to regulate; and, third, there is the authority to impose a license tax, "regulate, restrain, prohibit and suppress." Anderson v. City of Olivette, 518 S.W.2d 34, 39 (Mo. 1975). The portions of Section 94.110 relevant to your questions are as follows:

94.110. License taxes on certain businesses.--The council shall have power and authority to levy and collect a license tax on . . . street contractors, paper hanger contractors, painting contractors, plastering contractors, and all subcontractors, . . ., and all other vocations whatsoever, . . .; and to levy and collect a license tax and regulate . . . sewer contractors, building contractors, stone contractors, plumbing contractors, brick contractors, cement contractors, sidewalk contractors, bridge contractors, and all subcontractors, . . .; and all others pursuing like occupations; and to levy and collect a license tax, regulate, restrain, prohibit and suppress . . ., and all other vocations and business whatsoever, and all others pursuing like occupations.

Electricians or electrical contractors are not specifically named in Section 94.110. Concluding phrases such as "all others pursuing like occupations" and "all other vocations and business whatsoever," are too general to empower the city to tax an occupation not specifically named. Courts have held that

Section 71.610 prohibits the use of general concluding phrases to serve as authority for municipal corporations to impose license fees or taxes on those businesses and trades not specifically designated. See, for example, City of Independence v. Cleveland, 167 Mo. 384, 67 S.W. 216 (1902) ("... and all other businesses, trades and avocations whatever,"); Siemens v. Shreeve, *supra*, ("... and to license, tax and regulate all occupations ... not heretofore enumerated, of whatsoever name or character, like or unlike, ..."); Moots v. City of Trenton, 214 S.W.2d 31 (Mo. 1948) ("... and all other vocations and business whatsoever, and all other pursuing like occupations"); City of Ozark v. Hammond, 329 Mo. 1118, 49 S.W.2d 129 (1932) ("... and all other business, trade and avocations whatever, ..."). The rationale behind these holdings was based on the legislative history of what is now Section 71.610, RSMo 1986.

"Reverting to Section 71.610, we take note of its historical background. Enacted initially in 1889, (as Section 1900), its passage was intended to curb attempts by certain municipal authorities to appropriate and exercise power to license and tax 'all other business, trades, avocations or professions whatever' in addition to those specifically named in the city charter -- all contrary to what had previously been the long established and well recognized legal policy of the state. See, City of St. Louis v. Laughlin, 49 Mo. 559 decided in 1872, wherein Judge Wagner wrote that 'the state might delegate the authority, (to impose occupation license taxes) but it should be done in clear and unambiguous terms' and that 'to give the words "all other business, trades, avocations or professions" the meaning contended for (under the rule of ejusdem generis) would give the city the power of taxation by license over nearly every laborer. I am of the opinion that the Legislature had no such intention in view.'" City of Odessa v. Borgic, *supra* at 614.

As the court in Siemens v. Shreeve, *supra*, stated, the rule of strict construction was to prevent cities from making a "wholesale delegation of the taxing authority" to themselves by use of such all inclusive phrases. *Id.* at 418.

John D. Wiggins

Based on the above authorities, we conclude that a city of the third class does not have legal authority to levy and collect a license tax on electricians.

Your second question concerns the authority of the city to regulate electricians by requiring them to obtain licenses conditioned on their passing a proficiency examination. In view of our answer to your first question, it is assumed that the license is not conditioned upon the payment of any type of license fee or tax. The standard for deciding whether a third class city is granted such regulatory authority is set forth in Anderson v. City of Olivette, supra at 37 and 39:

"In its relations with cities the state retains control to a great extent over the governmental functions of a city. Exercise of the police power is a governmental function, the control of which remains in the state. A city has no inherent police power. Its authority to exercise such power within a particular field must come from a specific delegation by the state or in certain cases from the express or fairly implied grant of powers of its charter.'
[quoting from Tietjens v. City of St. Louis, 359 Mo. 439, 222 S.W.2d 70, 73 (banc 1949)]

*

*

*

"A municipal corporation such as appellant [a third class city] is a creature of the legislature, possessing only those powers expressly granted or those necessarily or fairly implied in or incidental to express grants, or those essential to the declared objects of the municipality. City of St. Louis v. Kaime, 180 Mo. 309, 79 S.W. 140, 143 (1904). Any reasonable doubt as to whether a power has been delegated to a municipality is resolved in favor of nondelegation. Tietjens v. City of St. Louis, supra. Insofar as third class cities are concerned, the legislature has gone to such detail in specifying the businesses and callings which may be the subject of municipal legislation."

John D. Wiggins

If a specific trade or type of business is not named in Section 94.110 as being subject to the regulatory power of a third class city, the city may not regulate that trade or business. Anderson v. City of Olivette, supra at 39. Neither can reference to the general police powers of the city serve as authority for such regulation. Id.

CONCLUSION

It is the opinion of this office that: (1) a city of the third class is not authorized to levy and collect a license tax on electricians, and (2) a city of the third class is not authorized to regulate the business of electricians by requiring electricians to first obtain a license, the issuance of which is conditioned on the electrician satisfactorily passing a proficiency exam.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

¹Section 71.610, RSMo 1986, provides:

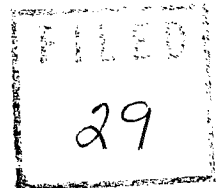
71.610. Imposition of tax on business, when.--No municipal corporation in this state shall have the power to impose a license tax upon any business, avocation, pursuit or calling, unless such business, avocation, pursuit or calling is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute.

BAIL BONDS: Money deposited as a cash bond
BONDS: during the course of legal
CIRCUIT COURTS: proceedings is "intangible
UNCLAIMED PROPERTY: personal property" within the
UNIFORM DISPOSITION OF meaning of Section 447.532, RSMo
UNCLAIMED PROPERTY ACT: 1986, and will become abandoned
property subject to the provisions of Sections 447.500 through 447.585, RSMo 1986, if such money remains unclaimed for more than seven (7) years after the depositor became entitled to reclaim such money by reason of the fulfillment of the condition of the bond.

April 26, 1988

OPINION NO. 29-88

Carl M. Koupal, Jr.
Director
Department of Economic Development
Post Office Box 1157
Jefferson City, Missouri 65102



Dear Mr. Koupal:

This opinion is in response to your question asking:

Does Chapter 447 RSMo govern the disposition of unreturned cash bonds currently being held by circuit courts through the State?

You have provided additional information from which it is evident that "unreturned cash bond" is intended to mean money deposited as a cash bond during the course of legal proceedings which the depositor has an unconditional right to reclaim because the condition of the bond has been fulfilled.

Sections 447.500 through 447.585, RSMo 1986, comprise Missouri's Uniform Disposition of Unclaimed Property Act ("the Act"), which became effective August 13, 1984. The Act is a substantial replication of the major provisions of the Uniform Disposition of Unclaimed Property Act (1966 revision), 8A U.L.A. 135, promulgated by the National Conference of Commissioners on Uniform State Laws. It establishes a scheme whereby persons holding unclaimed property belonging to another are required to deliver such property to the state, which becomes the custodian thereof in perpetuity, subject to the right of the owner at any time thereafter to present his claim to the state and recover

Carl M. Koupal, Jr.

his property. The provisions of the Act are administered by the director of the Department of Economic Development.

Section 447.532, RSMo 1986, which is identical to § 8 of the Uniform Act, 8A U.L.A. at 171, provides as follows:

All intangible personal property held for the owner by any court, public corporation, public authority, or public officer of this state, or a political subdivision thereof, that has remained unclaimed by the owner for more than seven years is presumed abandoned.

The term "intangible personal property" is not defined in either the Uniform Act or Missouri's version of it. However, the Commissioners' Comment to § 9 of the Uniform Act, 8A U.L.A. at 173, indicates that "intangible personal property" will encompass a wide variety of items,

including, by way of illustration, money, stocks, bonds, certificates of membership in corporations, securities, bills of exchange, deposits, interest, dividends, income, amounts due and payable under the terms of insurance policies not covered by section 4, pension trust agreements, profit-sharing plans, credit balances on paid wages, security deposits, refunds, funds deposited to redeem stocks, bonds, coupons and other securities, or to make a distribution thereof[.]

Consonant with the foregoing Comment, the courts in other Uniform Act states have construed "intangible personal property" to include such diverse items as unclaimed salaries, wages and commissions, Treasurer and Receiver General v. John Hancock Mutual Life Insurance Company, 446 N.E.2d 1376 (Mass. 1983), and State v. Pacific Far East Line, Inc., 68 Cal.Rptr. 67 (Cal.App. 1968); unclaimed medical, surgical and hospital benefits, Revenue Cabinet v. Blue Cross and Blue Shield of Kentucky, Inc., 702 S.W.2d 433 (Ky. 1986), and Blue Cross of Northern California v. Cory, 174 Cal.Rptr. 901 (Cal.App. 1981); unclaimed life insurance proceeds and accident and health insurance benefits, Treasurer and Receiver General v. John Hancock Mutual Life Insurance Company, *supra*; unclaimed insurance premium refunds, Revenue Cabinet v. Blue Cross and Blue Shield of Kentucky, Inc., *supra*; unclaimed utility refunds, Cory v. Public Utilities Commission, 658 P.2d 749 (Cal. 1983);

Carl M. Koupal, Jr.

unredeemed gift certificates and credit memoranda, People ex rel. Callahan v. Marshall Field & Company, 404 N.E.2d 368 (Ill.App. 1980); unclaimed assets of a dissolved corporation held for distribution to shareholders, In re Monks Club, Inc., 394 P.2d 804 (Wash. 1964); unclaimed oil royalties, Boswell v. Citronelle-Mobile Gathering, Inc., 294 So.2d 428 (Ala. 1974); unclaimed residuals payable to entertainers, Screen Actors Guild, Inc. v. Cory, 154 Cal.Rptr. 77 (Cal.App. 1979); and unclaimed school bond redemption funds, State ex rel. Mallicoat v. Coe, 460 P.2d 357 (Ore. 1969).

Based on the foregoing, we conclude the unreturned cash bonds are "intangible personal property" for purposes of Section 447.532. Pursuant to that section, a bond that remains unclaimed for more than seven (7) years after the depositor became entitled to reclaim such bond is presumed abandoned.

Conclusion

It is the opinion of this office that money deposited as a cash bond during the course of legal proceedings is "intangible personal property" within the meaning of Section 447.532, RSMo 1986, and will become abandoned property subject to the provisions of Sections 447.500 through 447.585, RSMo 1986, if such money remains unclaimed for more than seven (7) years after the depositor became entitled to reclaim such money by reason of the fulfillment of the condition of the bond.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

PUBLIC RECORDS: Settlement agreements entered into
RECORDS: by public governmental bodies prior
SETTLEMENT OF CLAIMS: to September 28, 1987 as a final
STATE AUDITOR: disposition to a legal action could
SUNSHINE LAW: have been closed and may remain
closed subsequent to September 28,
1987, which is the effective date of the revised Sunshine Law;
however, settlement agreements entered into subsequent to
September 28, 1987 are to be made public at the conclusion of
the litigation pursuant to Section 610.021(1), RSMo Supp. 1987.

August 4, 1988

OPINION NO. 30-88

The Honorable Margaret Kelly, CPA
State Auditor
State Capitol Building, Room 224
Jefferson City, Missouri 65101



This opinion is in response to your question asking:

If a lawsuit brought against a political subdivision and its governing body is resolved pursuant to a settlement agreement, may the settlement agreement be made a closed record, especially with respect to terms and conditions of the settlement agreement that obligate the political subdivision to pay public monies to private individuals?

You have informed us that the settlement agreement about which you are concerned was entered into and approved by the court in August, 1985. Section 610.025, RSMo Supp. 1984, the applicable law at the time of the settlement agreement, stated in part:

610.025. Closed meetings authorized, when.--1.
Any meeting, record or vote pertaining to legal actions, causes of action, or litigation involving a public governmental body, leasing, purchase or sale of real estate where public knowledge of the transaction might adversely affect the legal consideration therefor may be a closed meeting, closed record, or closed vote. (Emphasis added.)

Pursuant to this section, the settlement agreement about which you are concerned could be made a closed record.

The Honorable Margaret Kelly, CPA

The law, as it existed in August 1985, did not include a provision requiring public governmental bodies to release closed records after any particular period of time. However, in 1987 the legislature amended Chapter 610, RSMo, commonly known as the "Sunshine Law." Subsection 1 of Section 610.021, RSMo Supp. 1987, as enacted in 1987, provides:

610.021. Closed meetings and records authorized, when--exceptions, parents and guardians to certain scholastic records and public access to certain personnel records.--Except to the extent disclosure is otherwise required by law, a public governmental body is authorized to close meetings, records and votes, to the extent they relate to the following:

(1) Legal actions, causes of action or litigation involving a public governmental body and any confidential or privileged communications between a public governmental body or its representatives and its attorneys. However, any vote relating to litigation involving a public governmental body shall be made public upon final disposition of the matter voted upon provided however, in matters involving the exercise of the power of eminent domain, the vote shall be announced or become public immediately following the action on the motion to authorize institution of such a legal action. Legal work product shall be considered a closed record; (Emphasis added.)

In addition, in 1987 the legislature included a broad policy statement to aid construction. Such statement is set forth in Section 610.011, RSMo Supp. 1987, which provides:

610.011. Liberal construction of law to be public policy.--1. It is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law. Sections 610.010 to 610.028 shall be liberally construed and their exceptions strictly construed to promote this public policy.

2. Except as otherwise provided by law, all public meetings of public governmental bodies shall be open to the public as set forth in section 610.020, all public records of public governmental bodies shall be open to the public for inspection and copying as set forth in sections 610.023 to 610.026, and all

The Honorable Margaret Kelly, CPA

public votes of public governmental bodies shall be recorded as set forth in section 610.015.

The new statute requires that "any vote relating to litigation involving a public governmental body shall be made public." If strictly construed, this language might indicate that only the number of votes cast for and against an unnamed proposition need be made public. The legislative policy statement prohibits such a narrow construction. "The standard rule of construction calls for a statute to be given a reasonable interpretation in light of the legislative objective." BCI Corporation v. Charlebois Construction Co., 673 S.W.2d 774, 780 (Mo. banc 1984). For a vote to be truly "public," a citizen examining the records of the public governmental body is entitled to know as much as if he observed the vote being taken in a public meeting. The word "vote," as used in Section 610.021(1), RSMo Supp. 1987, should be understood to include the proposition voted upon, any matter or material incorporated or referred to within the proposition, and a means of discerning how each member of the public governmental body cast his vote, all of which would be available to someone attending a public meeting. Therefore, Section 610.021(1), RSMo Supp. 1987, when read in conjunction with Section 610.011, RSMo Supp. 1987, is sufficiently broad to require public governmental bodies to disclose agreements made to settle litigation.

The next problem arises with the timing of disclosure. The statute provides that the disclosure shall occur "upon final disposition of the matter voted upon." The word "matter" may refer either to the proposition before the public governmental body or to the litigation itself. The effect of adopting the former construction would be to require the public governmental body to disclose the "vote," as that term is used in the preceding paragraphs, immediately after the "ayes" and "nays" are tallied. Although releasing news of a settlement agreement immediately after the public governmental body votes to accept a proposal may not compromise the litigation, there are other matters related to litigation which, if released to the public, could significantly prejudice the conduct of legal action. For example, the instruction "Offer him \$500, but we are willing to pay \$1,000," if made public, would seriously compromise the ability of a public governmental body to reach a favorable settlement. Because the statute speaks to more than settlement agreements, we interpret the statute as adopting the alternative construction, which would enable the public governmental body to prevent disclosure of all discussions, proposals and votes until the disposition of the litigation between the parties. Therefore, we conclude that Section 610.021(1), RSMo Supp. 1987

The Honorable Margaret Kelly, CPA

requires disclosure of matters related to litigation only at the conclusion of the litigation between the parties.

The question remains, however, as to whether the new statute applies to settlement agreements made before September 28, 1987, the effective date of the new statute. At the outset, we note that nothing in the revisions of 1987 expressly states that the new language shall apply retroactively. As a general rule, statutes are presumed to operate prospectively "unless the legislative intent that they be given retroactive operation clearly appears from the express language of the act or by necessary or unavoidable implication." Lincoln Credit Co. v. Peach, 636 S.W.2d 31, 34 (Mo. banc 1982), appeal dismissed, 459 U.S. 1094, 103 S.Ct. 711, 74 L. Ed 2d 942 (1983); Department of Social Services v. Villa Capri Homes, Inc., 684 S.W.2d 327, 332 (Mo. banc 1985).

As further evidence of the legislature's intent to have Section 610.021, RSMo Supp. 1987 apply only prospectively, we note that if Section 610.021, RSMo Supp. 1987 was applied retroactively, a governmental body could be placed in a position where it would be required by law to violate the terms of the settlement agreement and become liable for the breach of the agreement. The legislature is presumed not to have intended an unreasonable result. State ex rel. McNary v. Hais, 670 S.W.2d 494, 495 (Mo. banc 1984). The law must be applied prospectively so that such an unreasonable result cannot occur.

CONCLUSION

It is the opinion of this office that settlement agreements entered into by public governmental bodies prior to September 28, 1987 as a final disposition to a legal action could have been closed and may remain closed subsequent to September 28, 1987, which is the effective date of the revised Sunshine Law; however, settlement agreements entered into subsequent to September 28, 1987 are to be made public at the conclusion of the litigation pursuant to Section 610.021(1), RSMo Supp. 1987.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

February 4, 1988

OPINION LETTER NO. 31-88

Frederick A. Brunner
Director, Department of
Natural Resources
Post Office Box 176
Jefferson City, Missouri 65102

Dear Mr. Brunner:

This opinion letter is in response to your question asking whether the words "strikes the same" and "strikes the Mississippi River" as used in Sections 46.131 and 46.136, RSMo 1986, as those words relate to the boundaries of Pike and Ralls Counties mean the point when the line between Township 55 North and Township 56 North first strikes the west bank of the Mississippi River and, if so, whether the location of that point should be determined by the position of the river when the original government survey was made on November 22, 1816.

Pike County was first established by An Act for Establishing the County of Pike, 1 Terr. Laws 585 (December 14, 1818). Ralls County was created by An Act Establishing the County of Ralls, 1 Terr. Laws 650 (November 16, 1820) by taking land out of Pike County. As originally created, the boundary of Ralls County was to be reckoned "Beginning at a point in the middle of the main channel of the Mississippi river, opposite to the standard line, between townships fifty-five and fifty-six," twisting about for several calls, returning to a point on "the middle of the main channel of the Mississippi river; thence down and following the middle of the main channel thereof, to the place of beginning." 1 Terr. Laws 650, 651. As originally conceived, therefore, Ralls County was to be measured based on lines beginning and ending in the middle of the main channel of the Mississippi River.

In the years between 1820 and 1875, the Missouri legislature periodically redefined the boundary between Pike and Ralls Counties. The relevant portion of the current statutory language dates back to 1855 when the legislature

Frederick A. Brunner

adopted An Act Defining the Limits of the Several Counties in this State, Chapter 41, RSMo 1855 (December 13, 1855). The enactment in Section 35 relating to Ralls County states in part:

Beginning at a point in the middle of the main channel of the Mississippi river, where the prolongation east of the line, between townships fifty-six and fifty-seven, would intersect the same; ... [here follow several additional calls] ... thence in a direct line, to a point on the Mississippi river, where the line, between townships fifty-two and fifty-three, strikes the same; thence east, to the middle of the main channel of the Mississippi river; thence up said river, in the middle of the main channel, to the place of beginning.

(Emphasis added.) The word "strikes" strongly suggests that the measurement should be made at the first moment the line touches the river, which would be the western bank. The underscored language, however, removes any doubt. The point in question must be on the western bank rather than in the middle of the main channel because if the point were in the middle of the main channel, a call defining the next point to be in the middle of the main channel would be redundant. In land description problems, as well as statutory construction, the rule is to give effect to every clause, if possible.

The 1855 definition differs from the definition that appeared in preceding years. For whatever reason, the legislature changed the boundaries of Pike and Ralls Counties. In 1855 the legislature had the power to change the boundaries of counties. Abernathy v. Dennis, 49 Mo. 468, 470 (1872). The Missouri Constitution of 1875 altered the power of the legislature to change county boundaries. Provisions similar to the 1875 constitutional provisions survived as Article VI, Sections 1 and 4 of the current Constitution of 1945.

In both geometry and land measurement, the definition of a particular line requires either two points or a point and a direction. In the present case we are given two points. One point is the "southeast corner of section sixteen, township fifty-four, range five, west." The other point is the point at which the prolongation east of the line between townships fifty-five and fifty-six would intersect the west bank of the Mississippi River. Because the channel of the Mississippi River changes over time, the place at which the "prolongated" line

Frederick A. Brunner

intersects the river, too, has changed and will continue to change. Given that the boundary should be both fixed and ascertainable, the legislature must have intended that the point be fixed as of some particular instant in time. Because the Act Defining the Limits of the Several Counties in this State did not specify a particular time, the problem remaining is to determine what instant the legislature intended.

As a general principle, when private parties use a watercourse as an aid to defining a boundary, they are presumed to have intended to use the location of the watercourse as it existed at the time of the grant. Farrow v. Trickey, 374 S.W.2d 49 (Mo. 1963). The rule works well because the transaction affects only the parties and those claiming through them. Because at common law the parties were presumed to be present at the site of the land at the time of conveyance, they could see and readily understand the natural boundary. See E.Coke, The First Part of the Institutes of the Laws of England *48[a] (1853). Under this rule, private parties would use the location of the river at the time of the grant to determine the end point of the line between Pike and Ralls Counties.

Unlike conveyances between private parties, however, the legislature cannot be presumed to have been in Pike or Ralls County when it defined the boundaries. Nor can the rationale used to support the Farrow rule apply to legislative line drawing. In our opinion, the legislature relied upon the existing surveys of northeastern Missouri for the location of township lines and for the relative placement of the Mississippi River. Because the only survey of northeastern Missouri that contained range and township lines extant in 1855 was the official United States survey of public lands, we believe the legislature intended that the boundary between Pike and Ralls counties should be determined based upon the relative positions of the township lines and the Mississippi River as shown on the government survey of November 22, 1816.

Frederick A. Brunner

Accordingly, it is the opinion of this office that the words "strikes the same" and "strikes the Mississippi River" mean the point when the line between Township 55 North and Township 56 North first strikes the west bank of the Mississippi River as shown on the original government survey made on November 22, 1816.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

1

The reference to sections fifty-two and fifty-three instead of fifty-five and fifty-six, an obvious clerical error, was added to the description of Ralls County in 1855. In the original act, the boundary had been defined relative to sections fifty-five and fifty-six. The revisor of statutes noted the discrepancy in 1929. See Section 11924, RSMo 1929. The legislature changed the description to conform with the current statutory language in 1939. See 1939 Missouri Laws 634 (June 13, 1939). The current statute refers to sections fifty-five and fifty-six.

ECONOMIC DEVELOPMENT,
DEPARTMENT OF:
COSMETOLOGY, BOARD OF:

cosmetology shop, which license is sometimes referred to as a booth rental license.

The Board of Cosmetology has the authority to issue a shop license to an individual renting space within a licensed

May 31, 1988

OPINION NO. 32-88

Carl M. Koupal, Jr., Director
Department of Economic Development
Truman State Office Building, Room 680
Jefferson City, Missouri 65101

Dear Mr. Koupal:

This opinion is in response to your question asking whether the Board of Cosmetology has the authority to issue a shop license to an individual renting space within a licensed cosmetology shop, which license is sometimes referred to as a booth rental license.

A license is required for each shop in which the practice of cosmetology is performed. Section 329.030, RSMo 1986, states:

329.030. Certificate of registration required.
-- It shall be unlawful for any person in this state to engage in the occupation of hairdresser or cosmetologist or manicurist, or to conduct a hairdressing or cosmetologist's or manicurist's establishment or school, unless such person shall have first obtained a certificate of registration as provided by this chapter.

In addition, Section 329.045, RSMo 1986, states, in pertinent part:

329.045. Registration of shop required, fee--display of certificate. -- Every shop or establishment in which the occupation of hairdresser, cosmetologist, or manicurist is practiced shall be required to obtain a

certificate of registration from the state board of cosmetology....

A "booth rental license" is a shop license. The shop in such instance is the particular "booth" or "chair" used by a cosmetologist for working on clients. This "booth" or "chair" is generally located within a licensed cosmetology shop. It is not, however, considered part of that cosmetology shop. The cosmetologist to whom the "booth rental license" is issued is not, for purposes of Chapter 329, RSMo, an employee of the licensed shop in which the cosmetologist's "booth" is located. The "booth rental" is considered a free-standing shop subject to the regulatory requirements of all shops, although it is physically located within the walls of a separately licensed shop.

4 CSR 90-4.010(5) sets this forth as follows:

(5) Rent Space--Any licensed cosmetologist practicing the profession of cosmetology in a licensed beauty shop, other than as a shop employee, or in a barber shop must possess a current shop license as well as an operator license. These shop licenses will be issued in accordance with the provisions and requirements defined in 4 CSR 90-4.010(1) and (2).

The purpose for licensing cosmetology shops is to protect the public. This principle has been summarized as follows:

It is well established that professions or trades operating directly on the person and thereby directly affecting the health, comfort, and safety of the public may be regulated by the legislature under the police power, which enables the legislature to make all needful rules and regulations for the health, safety, and welfare of the people of the state.

The occupation of beauty culturist is embraced in this general principle, being, while a lawful business, an occupation which, because of its intimate relation to the public health, is within that class of trades, professions, or callings which may, under the police power, be regulated by law without depriving a citizen of his natural

rights and privileges guaranteed by fundamental law. Those who are engaged therein are subject to regulations which require that beauty parlors be operated in a clean and sanitary manner and by competent operators, to the end that the public may be protected against the spread of communicable diseases.

56 ALR2d 879, 883.

The apparent intent of the legislature in requiring that a shop be licensed is to ensure that the location of the facilities being used in the practice of this occupation meet the required health and sanitation standards. The location, size, and number of employees of any given shop are not issues of concern regarding licensure except insofar as they impact on the above-stated apparent legislative intent.

The "booth" (shop) must meet all health and sanitation requirements as required of any other shop. The fact that it consists of only one "booth" or "chair" and is physically located within another licensed shop is not related to the health and sanitation concerns for licensing shops and would, therefore, not be a factor in determining whether such a license may be issued.

In addition, the statutory definition of a cosmetology shop does not preclude the licensing of a single "booth" as a shop. Section 329.010(3), RSMo 1986, defining "[h]airdressing or cosmetologist's or manicurist's shop," states:

329.010. Definitions. -- As used in this chapter, unless the context clearly indicates otherwise, the following words and terms shall mean:

* * *

(3) "Hairdressing or cosmetologist's or manicurist's shop", that part of any building wherein, or whereupon, any of the classified occupations are practiced;

A single "booth" at which the practice of cosmetology is performed would constitute a "part of any building" as stated above. Whether or not the remaining part of that building is likewise licensed as a separate shop has no bearing upon the licenseability of the individual booth.

The issues concerning the status of persons holding a "booth rental" shop license for purposes of taxation are not relevant to whether such a license may be issued pursuant to the statutory requirements of Chapter 329, RSMo.

CONCLUSION

It is the opinion of this office that the Board of Cosmetology has the authority to issue a shop license to an individual renting space within a licensed cosmetology shop, which license is sometimes referred to as a booth rental license.

Very truly yours,

William L. Webster
WILLIAM L. WEBSTER
Attorney General

STATE FIRE MARSHAL:

FIRE PROTECTION --

FIRE PROTECTION DISTRICTS:

1. The state fire marshal has the authority to send an arson investigator to investigate a fire or to assist a fire district or department. 2. The fire chief of a district or department can request assistance from either the state fire marshal or local authorities in investigating a fire but cannot exclude any appropriate authority -- either the fire marshal or local authorities with jurisdiction -- from assisting/investigating if they so desire.

July 27, 1988

OPINION NO. 35-88

Richard C. Rice
Director
Department of Public Safety
Post Office Box 749
Jefferson City, Missouri 65102

Dear Mr. Rice:

This opinion is issued in response to your questions asking:

Does the State Fire Marshal have the authority to send an arson investigator to assist a fire district or department if requested to do so by the fire chief of that district or department?

Can the fire chief of the district or department decide whether he wants local assistance or state assistance?

Section 320.202, RSMo 1986, provides:

320.202. Division of fire safety, created -- duties of division and fire marshal. -- 1. There is hereby established within the department of public safety a "Division of Fire Safety", which shall have as its chief executive officer the fire marshal appointed under section 320.205. The fire marshal and the division shall be responsible for:

(1) The training of firefighters, investigators, and any state employees per-

Richard C. Rice

forming fire inspections pursuant to state statutes or state licensing requirements;

(2) Establishing and maintaining a statewide reporting system, which shall, as a minimum, include the records required by section 320.235 and a record of all fires occurring in Missouri showing:

(a) The name of all owners of personal and real property affected by the fire;

(b) The name of each occupant of each building in which a fire occurred;

(c) The total amount of insurance carried by, the total amount of insurance collected by, and the total amount of loss to each owner of property affected by the fire; and

(d) All the facts, statistics and circumstances, including, but not limited to, the origin of the fire, which are or may be determined by any investigation conducted by the division or any local firefighting agency under the laws of this state.

All records maintained under this subdivision shall be open to public inspections during all normal business hours of the division;

(3) Conducting all investigations of fires mandated by sections 320.200 to 320.270;

(4) Conducting all fire inspections required of any private premises in order for any license relating to such private premises to be issued under any licensing law of this state, except those organizations and institutions licensed pursuant to chapters 197 and 198, RSMo.

2. The state fire marshal shall exercise and perform all powers and duties

Richard C. Rice

necessary to carry out the responsibilities imposed by subsection 1 of this section, including, but not limited to, the power to contract with any person, firm, corporation, state agency, or political subdivision for services necessary to accomplish any of the responsibilities imposed by subsection 1 of this section.

Section 320.230.1, RSMo 1986, mandates that:

320.230. Investigations conducted -- cooperation with local officials required. -- 1. The state fire marshal shall conduct investigations and may conduct hearings into the cause, origin, or circumstances of fire losses and shall cooperate with the appropriate fire or police officials of this state or its political subdivisions in investigations of the cause, origin, or circumstances of fires, explosions, or related occurrences involving the possibility of arson or related offenses.

Section 320.240, RSMo 1986, reads:

320.240. Property may be entered for investigation, when. -- The state fire marshal or investigator may at all reasonable hours enter in or upon any property to make an investigation of a fire loss or for determining the origin of any fire, but this section shall apply to the interior of a privately occupied dwelling only when a fire has occurred therein.

Section 320.250, RSMo 1986, reads:

320.250. Powers of political subdivisions not affected. -- Sections 320.200 to 320.270 shall not deprive the authorities of any county, city, or other political subdivision of any power or jurisdiction over property or fire regulations.

Richard C. Rice

1.

The primary rule of statutory construction is to ascertain the intent of the lawmakers from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning. Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397, 401 (Mo. banc 1986). In determining the legislature's intention, provisions of the entire legislative act must be construed together, and if reasonably possible, all provisions must be harmonized. Collins v. Director of Revenue, 691 S.W.2d 246, 251 (Mo. banc 1985).

The plain meaning of the statutes herein cited is that the state legislature intended the state fire marshal to have authority to conduct investigations and hearings "into the cause, origin, or circumstances of fire losses." Section 320.230.1, RSMo 1986. Section 320.240, RSMo 1986, provides for the investigation into the origin of "any fire". This authority is limited only to the extent that the fire marshal is to "cooperate with the appropriate fire or police officials of this state or its political subdivisions" in investigations where arson or related offenses are possible. Section 320.230.1, RSMo 1986. Thus, whether requested or not, the state fire marshal has the authority to send an arson investigator to investigate a fire or to assist a fire district or department.

2.

As to whether the fire chief of a district or department can decide whether he wants local assistance or state assistance, following the rationale above in the language of Sections 320.230.1 and 320.250, a fire chief may request assistance from either the fire marshal or any appropriate local authority. At the same time, a fire chief cannot exclude any appropriate authority -- either the fire marshal or local authorities with jurisdiction -- from assisting/investigating if they so choose.

Conclusion

Therefore, it is the opinion of this office that:

1. The state fire marshal has the authority to send an arson investigator to investigate a fire or to assist a fire district or department.

Richard C. Rice

2. The fire chief of a district or department can request assistance from either the state fire marshal or local authorities in investigating a fire but cannot exclude any appropriate authority -- either the fire marshal or local authorities with jurisdiction -- from assisting/investigating if they so desire.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'Wm Webster', with a long horizontal flourish extending to the right.

WILLIAM L. WEBSTER
Attorney General



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

April 18, 1988

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P.O. Box 899
(314) 751-3321

OPINION LETTER NO. 36-88

Stanley M. Thompson
Ray County Prosecuting Attorney
Post Office Box 535
Richmond, Missouri 64085

Dear Mr. Thompson:

This opinion letter is in response to your question asking:


Is the real estate owned by the Trustees of William Jewell College, located in Ray County, Missouri, and held by the Trustees of William Jewell College for investment purposes and leased by the Trustees of William Jewell College to a private individual for a profit, exempt from the real property taxes assessed against the realty by Ray County, Missouri?

In conjunction with your request, we reviewed the extensive legal memorandum which you provided as well as three Missouri Supreme Court cases dealing specifically with William Jewell College (State ex rel. Bannister v. Trustees of William Jewell College, 260 S.W.2d 479 (Mo. banc 1953); Trustees of William Jewell College of Liberty v. Beavers, 171 S.W.2d 604 (Mo. banc 1943); and State ex rel. Waller v. Trustees of William Jewell College, 234 Mo. 299, 136 S.W. 397 (Mo. banc 1911)) and Missouri Attorney General Opinion No. 54, Lockwood, October 28, 1947, a copy of which is enclosed. Although you discuss several theories in your memorandum by which a future Missouri Supreme Court might decide this issue differently, the fact remains that the current answer, as discussed in the above cases and the prior opinion of the Attorney General, appears to be that real estate owned by the trustees of William Jewell College and leased for a profit is nonetheless exempt from taxes.

Stanley M. Thompson

Until this position is attacked successfully in future litigation, it is the opinion of this office that the discussion of this issue in Attorney General Opinion No. 54, Lockwood, October 28, 1947, answers the question raised in your present request.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Wm L Webster", written in a cursive style.

WILLIAM L. WEBSTER
Attorney General

Enclosure:

Opinion No. 54, Lockwood, October 28, 1947.



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 731-3321

January 21, 1988

OPINION LETTER NO. 38-88

The Honorable Jan Martinette
Representative, District 47
State Capitol Building, Room 101-K
Jefferson City, Missouri 65101



Dear Representative Martinette:

This opinion letter is in response to your question asking:

May an Alderman of a Fourth Class City in the State of Missouri, serving as Acting President of the Board of Aldermen in the absence of the Mayor, vote one time in his position as Alderman, and a second time in his position as Mayor Pro Tem when there is a tie vote, which tie vote was caused by his vote as an Alderman?

It is our opinion that in the situation described in your question, an alderman serving as mayor pro tem may vote twice. Our opinion is based on the Missouri statutes which delineate the responsibilities of aldermen in fourth class cities, and on case law from other jurisdictions concerning related issues. Our research has revealed no Missouri appellate court decision addressing this question.

The statutes pertinent to this question are Sections 79.090, 79.100 and 79.120, RSMo 1986. These sections all relate to the duties of aldermen and mayors of fourth class cities in Missouri. They provide that the acting president of the board of aldermen, whose position is established by Section 79.090, assumes the role of mayor in the event of the mayor's disability or absence. Section 79.100 directs that in such an event, the acting president "shall . . . perform the duties of mayor, with all the rights, privileges, powers and jurisdiction of the mayor . . ." Among the mayor's "rights, privileges or powers" is the authority to vote in the case of a tie. See Section 79.120. Thus, these provisions indicate that in the mayor's absence, the

The Honorable Jan Martinette

acting president of the board of aldermen assumes the mayor's privilege of voting in the case of a tie.

The statutes, however, are silent on the remaining issue raised by your question. That issue is whether the acting president who exercises the mayor's tie-breaking power is also entitled to vote in his role as alderman. In other words, can the mayor pro tem create a tie with his vote as alderman and then break this same tie with his vote as mayor? The statutes' silence indicate that indeed this is possible. Because Section 79.100 does not provide that the acting president shall lose his authority as an alderman while acting as mayor, it must be assumed that his alderman's rights remain intact. These rights are conferred by other equally valid provisions and, since these rights are not inconsistent with the acting president's authority as mayor pro tem, they are not abrogated by implication. Moreover, to strip the mayor pro tem of his authority as an alderman would be to disenfranchise his ward. Thus, fairness as well as sound statutory construction support the conclusion that the mayor pro tem continues to enjoy the authority of an alderman.

There is support for this idea in cases from other jurisdictions. People ex rel. Walsh v. Teller, 7 N.Y.S.2d 168 (1938), is one such case. In this case, the New York Supreme Court was presented with the question of whether a mayor, who by law was both a member of the governing board and its presiding officer, could vote twice to create and break a tie. The court ruled that the mayor was entitled to two votes. The court observed: "The . . . Mayor of a village now has, and always did have, a vote on the Board If he had no more, a deadlock would have been created in the instant case, and public business would become imperilled. To grant the Mayor . . . the right to break this deadlock is not only reasonable, but wise. If the legislature intended to grant that power only, it would have said so." 7 N.Y.S.2d at 172. This observation is pertinent in all respects to the situation presented by your inquiry and supports the conclusion that the acting president may indeed vote twice in the case of a tie.


Another case supporting this conclusion is Markham v. Simpson, 175 N.C. 135, 95 S.E. 106 (1918). In this case, the Supreme Court of North Carolina concluded that it was proper for the chairman of the board of aldermen to vote twice where his first vote created a tie in the selection of a mayor. The Supreme Court of Michigan reached a similar conclusion in Whitney v. Common Council of Village of Hudson, 69 Mich. 189, 37 N.W. 184 (1888), construing a city's charter which gave each member a vote and in the case of a tie the president was to give

The Honorable Jan Martinette

the casting vote. The Michigan Court determined that "[t]his makes the president a voter upon every question, and, in case of tie, he has an additional vote." 37 N.W. at 188.

It is the opinion of this office that an alderman of a fourth class city in the State of Missouri, serving as acting president of the board of aldermen in the absence of the mayor, may vote one time in his position as alderman and a second time in his position as mayor pro tem when there is a tie vote, which tie vote was caused by his vote as an alderman.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

February 4, 1988

OPINION LETTER NO. 41-88

The Honorable Ron Auer
Representative, District 68
State Capitol Building, Room 413-A
Jefferson City, Missouri 65101

Dear Representative Auer:

This opinion letter is in response to your question asking:

For those Harris Stowe State College employees who are members of the Public School Retirement System of the City of St. Louis and elect under Section 104.342.5, RSMo, to become members of MOSERS, is the refund payable to them for accumulated contributions and the payment to MOSERS by the Public School Retirement System of the City of St. Louis for creditable prior service to be determined solely for the period of time after September 1, 1978 while Harris Stowe was a state college or for the entire period for which such person was employed by Harris Stowe, including that period prior to September 1, 1978 while Harris Stowe was owned and operated by the St. Louis Board of Education?

Conference Committee Substitute for Senate Substitute for House Committee Substitute for House Bill No. 713, Eighty-Fourth General Assembly, First Regular Session (hereinafter referred to as "House Bill 713") was passed by the Missouri General Assembly, signed into law by the Governor, and with an emergency clause, became effective on June 19, 1987. Among other matters, this legislation repealed Sections 104.342 and 174.320, RSMo 1986, relating to the participation of employees of Harris-Stowe State College in certain retirement systems and

The Honorable Ron Auer

enacted in lieu thereof two new sections relating to the same subject.

The participation of employees of Harris-Stowe State College in various retirement systems was previously set forth in Sections 174.320.1 and 174.320.2, RSMo 1986, which provided as follows:

174.320. Employees' retirement system provisions. -- 1. Any person employed by Harris-Stowe College prior to September 1, 1978, who is a member of the public school retirement system established in sections 169.410 to 169.540, RSMo, shall remain a member of that system. Any employer contributions required to be made by sections 169.410 to 169.540, RSMo, shall be made by the state of Missouri.

2. Any person employed on or after September 1, 1978, as an instructor, teacher or administrator of Harris-Stowe College is a member of the public school retirement system of Missouri created by sections 169.010 to 169.130, RSMo. Any other person employed on or after September 1, 1978, as an employee of Harris-Stowe College is a member of the Missouri state employees' retirement system established by sections 104.310 to 104.550, RSMo.

Section 174.320, RSMo 1986, was initially enacted in 1978 by Senate Bill No. 703, Seventy-Ninth General Assembly, Second Regular Session (hereafter referred to as "Senate Bill 703"). Senate Bill 703 generally provided for the acquisition of ownership and control and the assumption of administrative and financial responsibility by the State of Missouri for Harris-Stowe College, which had previously been owned and operated by the Board of Education of the City of St. Louis. See Sections 174.300 and 174.310, RSMo 1986 and Laws of Missouri, 1978, pp. 497-498. Under the provisions of Section 174.320.1, RSMo 1986, all persons (including certified and non-certified employees) employed by Harris-Stowe College prior to September 1, 1978 who were members of the Public School Retirement System of the City of St. Louis established by Sections 169.410 to 169.540, RSMo, would remain members of that retirement system. However, under the provisions of Section 174.320.2, RSMo 1986, any person employed on or after September 1, 1978, as an instructor, teacher or administrator of Harris-Stowe College (a certified employee) would become a

The Honorable Ron Auer

member of the Public School Retirement System of Missouri established by Sections 169.010 to 169.130, RSMo. Any other person employed on or after September 1, 1978, as an employee of Harris-Stowe College (a non-certified employee) would become a member of the Missouri State Employees Retirement System established by Sections 104.310 to 104.550, RSMo.

House Bill 713 repealed Section 174.320, RSMo 1986 and enacted a new section relating to the same subject which reads as follows:

174.320. Harris-Stowe College, retirement system provision. -- 1. Any person employed by Harris-Stowe College prior to September 1, 1978, who is a member of the public school retirement system established in sections 169.410 to 169.540, RSMo, and who did not become a member of the Missouri state employees' retirement system may remain a member of that public school retirement system. Any employer contributions required to be made by sections 169.410 to 169.540, RSMo, shall be made by the state of Missouri.

2. Any person employed on or after September 1, 1978, as an instructor, teacher or administrator of Harris-Stowe College and who did not become a member of the Missouri state employees' retirement system under section 104.342, RSMo, is a member of the public school retirement system of Missouri created by sections 169.010 to 169.130, RSMo. Any other person employed on or after September 1, 1978, as an employee of Harris-Stowe College is a member of the Missouri state employees' retirement system established by sections 104.310 to 104.550, RSMo.

In addition, House Bill 713 repealed Section 104.342, RSMo 1986, and enacted a new section relating to the same subject which provides in pertinent part as follows:

104.342. Certain teachers hired by the state to be members, when -- election to remain member of public school retirement system, how made, when -- effect of failure to make election. --

* * *

3. Any person who is duly certificated under the laws governing the certification of teachers and who is employed on a full-time basis by Northeast Missouri State University, Northwest Missouri State University, Central Missouri State University, Southeast Missouri State University, Southwest Missouri State University or Harris-Stowe State College to begin employment on or after July 1, 1987, shall be a member of the system from the date on which such employment begins; except that any such person who at the time of such employment has membership in one of the retirement systems established under sections 169.010 to 169.140, RSMo, or sections 169.410 to 169.540, RSMo, may make an election to continue in that retirement system if such election is made within thirty days of the date on which such employment begins.

* * *

5. . . . any person employed in any of the positions described in subsection 3 or 4 of this section immediately prior to and on June 30, 1987, or any person employed by Harris-Stowe State College under subsection 1 of section 174.320, RSMo, on or before June 30, 1987, who is not duly certified as a teacher and who is a member of the public school retirement system established in sections 169.410 to 169.540, RSMo, may elect, in writing to:

(1) Become a member of the Missouri state employees' retirement system effective January 1, 1988. Any person who, by virtue of an election made under this subdivision, becomes a member of the Missouri state employees' retirement system and shall be entitled to creditable prior service for service rendered in any of the positions described in subsections 1, 3, and 4 of this section or for service rendered as an employee of Harris-Stowe State College under subsection 1 of section

The Honorable Ron Auer

174.320, RSMo. Any person who so elects shall be eligible, upon written request filed with the appropriate public school retirement system under chapter 169, RSMo, to receive a refund of his accumulated contributions for the creditable service in any of the positions described in subsections 1, 3, and 4 of this section or the creditable service rendered as an employee of Harris-Stowe State College under subsection 1 of section 174.320, RSMo, including interest of at least six percent and upon payment of such refund, that public school retirement system shall pay to the state employees' retirement system on or before June 30, 1988, an amount equal to the amount paid that public school retirement system as established under sections 169.010 to 169.140, RSMo, on behalf of each member so electing by his employer for such service, or that public school retirement system established under sections 169.410 to 169.540, RSMo, shall pay to the state employees' retirement system on or before June 30, 1988, the lesser of an amount equal to that paid that public school retirement system in accordance with section 169.500, RSMo, for each member so electing for such service, or an amount actuarially determined to be sufficient to fund benefits earned under sections 169.410 to 169.540, RSMo, for the creditable prior service less the contribution refunded to the member under this subsection. This amount shall be determined by an actuary employed or retained by the Missouri state employees' retirement system; or

(2) Continue as a member of the appropriate public school retirement system under chapter 169, RSMo. Any person entitled to make the election provided by this subsection who does not make such election, in writing, by December 31, 1987, shall be deemed to have elected to be governed by subdivision (1) of this subsection.

* * *

7. Notwithstanding any provisions of chapter 169, RSMo, to the contrary, any member who becomes a member under the provisions of subsection 2, 5, or 6 of this section and who has creditable service with a public school retirement system under that chapter because of employment with any employer other than those defined in subsection 1, 3, or 4 of this section shall immediately vest in that public school retirement system and upon attainment of the minimum retirement age of that system shall be entitled to a monthly benefit based on such creditable service and the law in effect at that time, provided the person does not elect to withdraw his accumulated contributions for such creditable service from that public school retirement system.

The primary rule in statutory construction is to ascertain and give effect to legislative intention. Missouri Pacific Railroad Company v. Kuehle, 482 S.W.2d 505 (Mo. 1972). In addition, statutes in pari materia must be read and construed together in order to keep provisions of law on the same subject in harmony so as to work out and accomplish the central idea and intent of the lawmaking branch of state government. State ex rel. Day v. County Court of Platte County, 442 S.W.2d 178 (Mo. App. 1969).

It is our opinion that the provisions of Sections 174.320 and 104.342 of House Bill 713 when harmonized, provide that any person who is an employee of Harris-Stowe State College and who has membership in Public School Retirement System of the City of St. Louis (hereinafter referred to as "PSR") or the Public School Retirement System of Missouri (hereinafter referred to as "PSRS") could elect to either remain in PSR or PSRS or elect to become a member of the Missouri State Employees Retirement System (hereinafter referred to as "MOSERS"). This is true without regard to teacher certification or nature of duties. The election was to be made prior to December 31, 1987, and if the person failed to make any written election, he or she is deemed to have elected MOSERS membership. For those individuals who elected to become members of MOSERS on January 1, 1988, they will be entitled to receive creditable service with MOSERS for all of their state service and will also receive a refund of their contributions from PSR or PSRS for that service plus

The Honorable Ron Auer

interest of at least six percent (6%). PSR or PSRS shall then pay to MOSERS on or before June 30, 1988, an amount equal to the amount paid PSR or PSRS on behalf of each member so electing by his or her employer for such service. All other non-state service accrued under PSR or PSRS will be immediately vested and these employees will receive a benefit check from PSR or PSRS upon normal retirement age under PSR or PSRS.

The State of Missouri assumed financial responsibility for Harris-Stowe State College on July 1, 1978 under the provisions of Section 174.310.3 as enacted in 1978. Further, under the provisions of Section 174.320 as enacted in 1978, any person employed by Harris-Stowe State College prior to September 1, 1978 who was a member of PSR remained a member of that system. At such time the State of Missouri under the provisions of Section 174.320.1 also assumed responsibility for any employer contributions that were required to be made to PSR. Therefore, it is our view that for those employees of Harris-Stowe State College who elected to become members of MOSERS on January 1, 1988, they will be entitled to receive creditable service with MOSERS and a refund of their accumulated contributions and interest from PSR for the period of time after September 1, 1978 when the State of Missouri assumed financial responsibility for Harris-Stowe State College. PSR shall then pay to MOSERS on or before June 30, 1988, an amount equal to the amount paid PSR on behalf of each member so electing by his or her employer for such service. All other non-state service accrued by employees of Harris-Stowe State College under PSR will be immediately vested and these employees will receive a benefit check from PSR upon normal retirement age under PSR.

In conclusion, it is our opinion that for those employees of Harris-Stowe State College who are members of PSR and who elected under the provisions of Section 104.342.5 of House Bill 713 to become members of MOSERS, the refund payable to them for accumulated contributions and interest and the payment to MOSERS by PSR for creditable prior service is to be determined for the period of time after September 1, 1978 when the State of Missouri assumed financial responsibility for Harris-Stowe State College.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

GROUP INSURANCE:
HEALTH INSURANCE:
INSURANCE:
SCHOOL DISTRICTS:
SCHOOLS:

Under Section 169.590, RSMo Supp. 1987, (1) a school district which provides group health insurance for its employees must offer the former employees who have retired and surviving spouses and surviving children of those former employees coverage under the school district's group policy at premiums equal to that charged for other members of the group, and (2) the retirees, their surviving spouses and their surviving children must pay the premium for such coverage and the school district cannot provide such health insurance coverage at no charge to those persons.

March 14, 1988

OPINION NO. 45-88

The Honorable Danny Staples
Senator, District 20
State Capitol Building, Room 418 A
Jefferson City, Missouri 65101



and

The Honorable Douglas Harpool
Representative, District 134
State Capitol Building, Room 317 A
Jefferson City, Missouri 65101

Dear Senator Staples and Representative Harpool:

Each of you has posed questions relating to group health insurance contracts for employees of Missouri school districts. Because of the similarities in the questions posed, we have combined your requests into one opinion. The questions posed by Senator Staples are as follows:

Is it permissible for a school district which provides group health insurance for its employees to offer to former employees who have retired and surviving spouses and children of former employees coverage under the district's group policy for premiums equal to: 1) an individual rate; 2) the group rate; or 3) at no charge?

The question posed by Representative Harpool is as follows:

The Honorable Danny Staples
The Honorable Douglas Harpool

In Senate Bill 264 enacted in the last session of the General Assembly school districts which provide health insurance plans for employees are required to make such plans open to participation by retirees and eligible survivors as part of the group insured. May a school district require a retiree or eligible survivor to pay a higher premium than the group rate premium regularly charged members of the group?

The questions posed involve an interpretation of Section 169.590, RSMo Supp. 1987, enacted in 1987 as Section 1 of Senate Bill No. 264, Eighty-Fourth General Assembly, First Regular Session. That statute provides:

1. Any insurance contract or plan issued or renewed after December 31, 1987, which provides group health insurance for employees of any Missouri school district shall contain provisions that permit:

(1) Any employee of such district who retires, or who has retired, and is receiving or is eligible to receive retirement benefits under this chapter to remain or become a member of the group;

(2) The surviving spouse of any employee to remain or become a member of the group, so long as such spouse is receiving or is eligible to receive retirement benefits under this chapter; and

(3) The surviving children of any employee to remain or become members of the group, so long as they are receiving or are eligible to receive retirement benefits under this chapter.

2. The plan or contract may provide a different level of coverage for any person electing to remain or become a member of an eligible group as provided in subsection 1 of this section if such person is eligible for medicare under the Federal Health Insurance for the Aged Act, 42 U.S.C. 1395, as amended.

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3. A person electing to become or remain a member of a group under Subsection 1 of this section must pay the premium for such coverage, including the premium for any covered dependents.

Ascertainment of legislative intent is the primary goal of statutory construction. State ex rel. Missouri State Board of Registration for Healing Arts v. Southworth, 704 S.W.2d 219, 224 (Mo. banc 1986); Collins v. Director of Revenue, 691 S.W.2d 246, 251 (Mo. banc 1985); O'Flaherty v. State Tax Commission of Missouri, 680 S.W.2d 153, 155 (Mo. banc 1984). The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning. Laclede Gas Company v. Labor and Industrial Relations Commission of Missouri, 657 S.W.2d 644, 650 (Mo.App. 1983); Thomas v. Frazier, 626 S.W.2d 682, 684 (Mo.App. 1981); City of Willow Springs v. Missouri State Librarian, 596 S.W.2d 441, 445 (Mo. banc 1980). The legislative intent is to be determined, insofar as possible, from the language of the statute itself. State v. Sweeney, 701 S.W.2d 420, 423 (Mo. banc 1985).

Subsection 1 of Section 169.590 makes specific reference three times to "the group." The apparent intent of the legislature is that retirees, surviving spouses, and surviving children who are receiving or are eligible to receive retirement benefits are to be eligible to be part of the same group for which the Missouri school district provides group health insurance. Subsection 3 of Section 169.590 requires that these persons pay "the premium" for such coverage. This language indicates that the legislature intended that premiums for retired employees, their surviving spouses and surviving children be the same as the premiums paid on behalf of the employees of the school district, their spouses and children under the group health insurance contract. Under this interpretation, the school district is required to contract to provide group health insurance for its retirees, their surviving spouses and their surviving children at the same rates as it contracts for health insurance for its employees, their spouses and children. An individual rate or higher rate cannot be charged.

Subsection 3 of Section 169.590 specifically requires a retired employee of a school district or the surviving spouse or surviving children to pay the entire premium of the health insurance coverage provided in subsection 1. Thus, a school district cannot provide health insurance coverage to those persons at no charge to such persons.

The Honorable Danny Staples
The Honorable Douglas Harpool

As has been the long-standing policy of this office, we do not opine on the constitutionality of the foregoing statute. See Gershman Investment Corporation v. Danforth, 517 S.W.2d 33 (Mo. banc 1974).

Conclusion

It is the opinion of this office that under Section 169.590, RSMo Supp. 1987, (1) a school district which provides group health insurance for its employees must offer the former employees who have retired and surviving spouses and surviving children of those former employees coverage under the school district's group policy at premiums equal to that charged for other members of the group, and (2) the retirees, their surviving spouses and their surviving children must pay the premium for such coverage and the school district cannot provide such health insurance coverage at no charge to those persons.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

August 9, 1988

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

OPINION LETTER NO. 46-88

The Honorable Delbert L. Scott
Representative, District 118
Box 82
Lowry City, Missouri 64763



Dear Representative Scott:

This opinion letter is in response to your questions asking:

1. Can a hospital organized pursuant to Chapter 206, RSMo, invest its funds in institutions outside the geographic boundaries of the hospital district?
2. Are hospitals organized pursuant to Chapter 206, RSMo, limited to investing in time deposits or their equivalent, such as a certificate of deposit, or can such a hospital invest its funds in other investment vehicles?
3. Are hospitals organized pursuant to Chapter 206, RSMo, limited to investing in banks or can deposits be made in savings and loan associations?

Chapter 206, RSMo, provides for the creation of hospital districts. Section 206.010.2, RSMo 1986, provides that, "[w]hen a hospital district is organized it shall be a body corporate and political subdivision of the state . . ." (Emphasis added.)

Your first question asks whether a hospital district can invest its funds outside the geographic boundaries of the hospital district. We presume your question relates to the investment of its funds in financial institutions in the State of Missouri, but outside the boundaries of the particular district. A review of Chapter 206 does not reveal any statutory provision requiring the investment of hospital district funds to

The Honorable Delbert L. Scott

be in financial institutions located within the geographic boundaries of the district and does not reveal any statutory provision prohibiting the hospital district from investing its funds in financial institutions outside the geographic boundaries of the district. Therefore, we conclude that a hospital district may invest its funds in financial institutions in the State of Missouri outside the geographic boundaries of the hospital district.

Your second question concerns the investment vehicles available to a hospital district. You have not indicated what particular type of investment vehicle the hospital district may be considering. The general rule regarding the investment of public funds is stated in Bragg City Special Road District v. Johnson, 20 S.W.2d 22, 24 (Mo. 1929) as follows:

The ruling in the University City Case was made in recognition of the rule followed in this state, and generally followed that the liability of the treasurer of a public corporation for its funds coming into his hands is absolute. . . . The rule is one founded upon considerations of public policy.

See also Missouri Attorney General Opinion No. 49, Kibbe, January 30, 1951, a copy of which is enclosed.

Pursuant to the standard regarding the investment of public funds, such funds should be invested conservatively. Time deposits such as a certificate of deposit would be an appropriate investment. While you have not specified what other investment vehicle the hospital district may be considering, many investment vehicles available to private citizens are not available to a political subdivision. See, for example, Missouri Attorney General Opinion No. 26-88, a copy of which is enclosed, holding that an ambulance district may not invest in mutual fund accounts.

Your third question asks whether a hospital district may deposit its funds in savings and loan associations. Subsection 1 of Section 369.194, RSMo 1986, provides:

369.194. Accounts declared legal investments for fiduciaries.--1. Accounts in insured associations are legal and proper investments or depositories for fiduciaries of every kind and nature, all political subdivisions or instrumentalities

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of this state, insurance companies, business and nonprofit corporations, charitable or educational corporations or associations, all financial institutions of every kind and character, all pension, endowment and scholarship funds both public and private, and each and all of them may invest funds in accounts in such associations. The director of the division of savings and loan supervision shall by regulation permit associations to pledge funds or assets in connection with the investment of public funds in accounts of associations, and may provide that accounts in associations shall be legal investments for any persons, firms, corporations or entities not herein specifically referred to. Notwithstanding anything to the contrary, accounts prohibited to a mutual association are prohibited to a capital stock association.

* * *

(Emphasis added.)

Based on this statutory provision, a hospital district may deposit its funds in a savings and loan association.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

Enclosures: Opinion No. 49, Kibbe, January 30, 1951
Opinion No. 26-88

COUNTIES:
COUNTY FUNDS:
COUNTY HOSPITAL:

Section 205.210, RSMo 1986, prohibits Jackson County from appropriating money from its general revenue for county hospital purposes.

January 19, 1988

OPINION NO. 47-88

The Honorable Robert Thane Johnson
Senator, District 8
State Capitol Building, Room 226
Jefferson City, Missouri 65101

Dear Senator Johnson:

This opinion is in response to your questions asking:

1. Is the Jackson County Legislature legally authorized under Section 205.230, RSMo to appropriate monies from the County's general fund for county hospital purposes in addition to the proceeds of the County's hospital and health levy?
2. If the answer to Question 1 is in the affirmative, what is the range of the level of appropriation from the County's general fund?

Jackson County is a first class county having a charter form of government.

Your question apparently arises as a result of a possible conflict between Section 205.210, RSMo 1986, and Section 205.230, RSMo 1986. Section 205.210 provides:

205.210. Hospital tax levy (first class charter counties). -- The governing body in all counties of the first class having a charter form of government, in addition to the power to levy taxes for county purposes as otherwise provided by law, shall have the power to levy upon all real and tangible personal property in the county an annual tax in an amount not to exceed thirty-eight cents on each one hundred dollars valuation for the purpose of operating, maintaining or supporting a

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public county hospital or public hospital system or for the maintenance of county patients in state institutions, public hospitals, or other hospitals and for the purpose of operating or maintaining a public county health center or institution and conducting public health programs. The proceeds of the tax shall be used for such purposes and for no other purposes, and no funds from the general revenue of the county shall hereafter be appropriated for such purposes.

(Emphasis added.) Section 205.230 provides:

205.230. Appropriation of general fund, when. -- In counties exercising the rights conferred by sections 205.160 to 205.340, the county commission may appropriate each year, in addition to tax for hospital fund herein provided for, not exceeding five percent of its general fund for the improvement and maintenance of any public hospital so established.

(Emphasis added.)

Several rules of statutory construction are of assistance in attempting to resolve the possible conflict between these two sections. In Goldberg v. Administrative Hearing Commission of Missouri, 609 S.W.2d 140 (Mo. banc 1980), the Missouri Supreme Court stated:

We are also obliged to reconcile and harmonize statutes dealing with the same subject if it is reasonably possible. When this is not possible, and one statute must prevail over another, a statute having a general application will be subordinated to one having a more specific application. [Citations omitted.] Id. at 144.

The Missouri Supreme Court in City of Kirkwood v. Allen, 399 S.W.2d 30 (Mo. banc 1966) stated:

[1, 2] ** * * where there are two acts on one subject, the rule is to give effect to both if possible, but if the two are repugnant in any of their provisions,

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the later act, without any repealing clause, operates to the extent of the repugnancy as to repeal the first. * * *"
[Citations omitted.] . . . Where a "specific" act applying to only one class of cities is enacted subsequent to the enactment of a "general" act applying to all cities, and certain provisions of the two acts cannot be harmonized, the "specific" act will be considered an exception to the "general" act and the terms of the "specific" act will prevail.
[Citations omitted.] Id. at 34.

Section 205.230 was initially enacted in substantially its present form in 1917. See Laws of Missouri, 1917, page 145. Section 205.230 applies generally to all counties exercising the rights conferred by Sections 205.160 to 205.340, RSMo. Section 205.210 was initially enacted in 1945. See Laws of Missouri, 1945, page 986. The second sentence of Section 205.210 stating that no funds from the general revenue of the county shall hereafter be appropriated for such purposes was added in 1951. See Laws of Missouri, 1951, page 778. Section 205.210 applies only to counties of the first class having a charter form of government. Section 205.210 was enacted subsequent to Section 205.230 and applies to only one particular type of county while Section 205.230 has general applicability to all counties exercising the rights conferred by Sections 205.160 to 205.340, RSMo. Applying the rules of statutory construction discussed above, Section 205.210, the specific law applying to only one class of counties which was enacted subsequent to the enactment of the general law, prevails over Section 205.230, the earlier enacted general law, to the extent the two sections conflict.

Section 205.210 states that no funds from the general revenue of the county shall hereafter be appropriated for such purposes. The purposes recited previously in that section include operating, maintaining or supporting a public county hospital or public hospital system or for the maintenance of county patients in state institutions, public hospitals, or other hospitals and for the purpose of operating or maintaining a public county health center or institution and conducting public health programs. Section 205.230 authorizes the county commission to appropriate each year, in addition to the tax for the hospital fund, not exceeding five percent of its general fund for the improvement and maintenance of any public hospital established pursuant to Sections 205.160 to 205.340, RSMo. With respect to the conflict between these two sections, we find no way to harmonize the conflicting provisions and conclude that


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the more recently enacted provision of Section 205.210 applying to a particular type of county prevails over the earlier enacted Section 205.230 which has general applicability. Pursuant to Section 205.210, Jackson County is prohibited from appropriating money from its general revenue for county hospital purposes.

CONCLUSION

It is the opinion of this office that Section 205.210, RSMo 1986, prohibits Jackson County from appropriating money from its general revenue for county hospital purposes.

Very truly yours,

A handwritten signature in dark ink, appearing to read "William L. Webster", with a horizontal line extending to the right.

WILLIAM L. WEBSTER
Attorney General

ECONOMIC DEVELOPMENT,
DEPARTMENT OF:
EMPLOYMENT:
PROFESSIONAL REGISTRATION,
DIVISION OF:
PUBLIC RECORDS:
RECORDS:
SUNSHINE LAW:

(1) When a vote is taken by a state licensing board to close an investigation prior to the filing of a complaint with the Administrative Hearing Commission and the vote is taken in a meeting closed pursuant to Section 610.021(14), RSMo Supp. 1987, there is no requirement

that the vote to close the investigation be made public, (2) when a vote is taken by a state licensing board in a meeting closed under Section 610.021(1), RSMo Supp. 1987, to accept a settlement proposal or compromise a matter in litigation, including a matter before the Administrative Hearing Commission, and that vote finally disposes of the matter, all votes relating to that litigation taken after September 28, 1987, shall be made public, and (3) when state licensing boards use consultants to investigate complaints, such consultants are not employees as that term is used in Section 610.021(3), RSMo Supp. 1987.

March 9, 1988

OPINION NO. 48-88

Carl M. Koupal, Jr.
Director
Department of Economic Development
Truman State Office Building, 6th Floor
Jefferson City, Missouri 65101



Dear Mr. Koupal:

This opinion is in response to your questions asking:

- I. To what extent, if any, do the provisions of section 610.021(1) RSMo as contained in House Committee Substitute for Senate Substitute for Senate Bill No. 2 require a public governmental body to make public votes taken in a properly closed meeting.
 - a. a vote is taken to close (i.e., terminate without action) an investigation of a formal complaint which has been filed with a licensing board and properly logged as a complaint pursuant to the provisions of section

Carl M. Koupal, Jr.

620.010.15(6) RSMO 1986 when the meeting was closed to the public under section 610.021(14) to discuss investigatory reports as provided for in section 620.010.14(7) RSMO 1986?

- b. a vote is taken in a meeting closed to the public under section 610.021(1) to accept a settlement proposal or compromise of a matter pending in litigation, including disciplinary actions pending before the Missouri Administrative Hearing Commission, when the vote so taken would act as a final disposition of the matter?

II. Do the provisions of section 610.021(1) require that, upon final disposition of a legal action, cause of action or litigation involving a public governmental body, particularly a state licensing board, all votes taken during sessions closed under section 610.021(1) regarding that subject matter in any respect be made public?

III. Does the term "employee" as it is used in section 610.021(3) include independent contractors of a licensing board such as consultants who are used by a Board to investigate complaints?

In 1987, House Committee Substitute for Senate Substitute for Senate Bill No. 2, 84th General Assembly, First Regular Session was enacted revising Chapter 610, RSMo, known as The Sunshine Law. The provisions of the bill are now set forth in RSMo Supp. 1987. The key provisions of Senate Bill No. 2 that apply to your questions are Sections 610.011 and 610.021.

Section 610.011 announces that it is the "public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law." That section further provides that exceptions must be strictly construed to promote that policy.

Carl M. Koupal, Jr.

Section 610.021 provides for 15 categories of meetings, records, and votes which may be closed. Pertinent to your first question are subsections (1), (5), (6), and (14).

Section 610.021(1) provides:

Legal actions, causes of action or litigation involving a public governmental body and any confidential or privileged communications between a public governmental body or its representatives and its attorneys. However, any vote relating to litigation involving a public governmental body shall be made public upon final disposition of the matter voted upon provided however, in matters involving the exercise of the power of eminent domain, the vote shall be announced or become public immediately following the action on the motion to authorize institution of such a legal action. Legal work product shall be considered a closed record;

Any vote relating to litigation in a meeting closed under this subsection is to be made public upon final disposition of the matter voted upon except in certain instances not relevant to your questions.

Section 610.021(14) allows public governmental bodies to close "[r]ecords which are protected from disclosure by law." Section 620.010.14(7), RSMo 1986, provides:

All educational transcripts, test scores, investigatory reports, and personal records of any board or commission are confidential and may not be disclosed to the public or any member of the public, except with the written consent of the person whose records are involved. Provided, however, that any board may disclose confidential information without the consent of the person involved in the course of voluntary interstate exchange of information, or in the course of any litigation concerning that person, or pursuant to a lawful request, or to other administrative or law enforcement agencies acting within the scope of their statutory authority. Information regarding identity,

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including names and addresses, registration, and currency of the license of the persons possessing licenses to engage in a professional occupation and the names and addresses of applicants for such licenses is not confidential information.

Under the provisions of Section 610.021(14) which, in effect, incorporates Section 620.010.14(7), reports prepared for licensing boards concerning pending investigations are confidential. There is no requirement in Section 610.021(14) or Section 620.010.14(7) that the vote to close the investigation be made public.

A board may close a meeting under Section 610.021(5) or (6) under certain circumstances. Subsection (5) provides: "Nonjudicial mental or physical health proceedings involving identifiable persons, including medical, psychiatric, psychological, or alcoholism or drug dependency diagnosis or treatment." Subsection (6) provides:

Scholastic probation, expulsion, or graduation of identifiable individuals, including records of individual test or examination scores, however, personally identifiable student records maintained by public educational institutions shall be open for inspection by the parents, guardian or other custodian of students under the age of eighteen years and by the parents, guardian or other custodian and the student if the student is over the age of eighteen years;

There are no provisions for making public votes taken in sessions discussing these matters. We recognize that licensing boards may close meetings under either of these subsections under appropriate circumstances.

The plain meaning of the statutory language is to be given effect whenever possible. State ex rel. D. M. v. Hoester, 681 S.W.2d 449, 450 (Mo. banc 1984). Moreover, legislative intent must be ascertained by giving effect to the plain language of the statute when viewed as a whole. A. B. v. Frank, 657 S.W.2d 625, 628 (Mo. banc 1983).

Based upon the statutory language, we conclude that when a vote is taken to close an investigation prior to the filing of a complaint with the Administrative Hearing Commission, and the

Carl M. Koupal, Jr.

vote is taken in a meeting closed pursuant to Section 610.021(14), there is no requirement that the vote to close the investigation be made public. When a vote is taken in a meeting closed under Section 610.021(1) to accept a settlement proposal or compromise a matter in litigation, including matters before the Administrative Hearing Commission, and that vote finally disposes of the matter, all votes relating to that litigation taken after September 28, 1987 (the effective date of Senate Bill No. 2) shall be made public.

Licensing boards must be mindful that they may not utilize the provisions of Section 610.021(14) to subvert the intent of the legislature, as stated in Section 610.011. If a matter is related to legal action, cause of action, or litigation and the board closes a meeting, record, or vote pursuant to that subsection, all votes relating to that litigation taken after the effective date of Senate Bill No. 2 (September 28, 1987) "shall be made public upon final disposition of the matter voted upon." It would not be proper to close a meeting under other subsections to avoid the provisions in Section 610.021(1).

Your third question asks whether the term "employee," as used in Section 610.021(3), includes independent contractors such as consultants who assist licensing boards in investigating complaints. Subsection (3) provides:

Hiring, firing, disciplining or promoting an employee of a public governmental body. However, any vote on a final decision, when taken by a public governmental body, to hire, fire, promote or discipline an employee of a public governmental body must be made available to the public within seventy-two hours of the close of the meeting where such action occurs; provided, however, that any employee so affected shall be entitled to prompt notice before such decision is made available to the public;

A fundamental tenet of statutory construction is that words used in statutes are to be considered in their plain and ordinary meaning in order to ascertain the intent of the lawmakers, Beiser v. Parkway School District, 589 S.W.2d 277, 280 (Mo. banc 1979); Bartley v. Special School District of St. Louis County, 649 S.W.2d 864, 867 (Mo. banc 1983); and Hoester, supra, and when a statute is plain and unambiguous, there is no room for construction and it must be applied by the courts as it was written by the legislature. United Air Lines,

Carl M. Koupal, Jr.

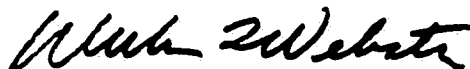
Inc. v. State Tax Commission, 377 S.W.2d 444, 448 (Mo. banc 1964).

The question is what constitutes an "employee" within the meaning of this statutory provision. Cases have addressed this issue in the area of workers compensation. A person who is engaged in the business of installation, maintenance, and repair of equipment and who holds himself out independently as available for employment by any person or company having need of his services was considered an independent contractor and not an employee of the entity which he contracted with for his services, Feldewerth v. Great Eastern Oil Co., 149 S.W.2d 410 (Mo. App. 1941). In deciding whether an individual is an employee "the ultimate test is whether [the hiring entity] had the right to control the method and manner by which the work was done." Huddleston v. Gitt and Sons Realty, 708 S.W.2d 149, 150 (Mo. App. 1985). When licensing boards use consultants to investigate complaints, such consultants would not be employees as that term is used in Section 610.021(3).

Conclusion

It is the opinion of this office that (1) when a vote is taken by a state licensing board to close an investigation prior to the filing of a complaint with the Administrative Hearing Commission and the vote is taken in a meeting closed pursuant to Section 610.021(14), RSMo Supp. 1987, there is no requirement that the vote to close the investigation be made public, (2) when a vote is taken by a state licensing board in a meeting closed under Section 610.021(1), RSMo Supp. 1987, to accept a settlement proposal or compromise a matter in litigation, including a matter before the Administrative Hearing Commission, and that vote finally disposes of the matter, all votes relating to that litigation taken after September 28, 1987, shall be made public, and (3) when state licensing boards use consultants to investigate complaints, such consultants are not employees as that term is used in Section 610.021(3), RSMo Supp. 1987.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

DEPARTMENT OF HIGHWAYS
AND TRANSPORTATION:
DEPARTMENT OF PUBLIC SAFETY:
GIFTS:
HIGHWAY PATROL:

The written permission referred to in the second sentence of Section 43.060.2, RSMo 1986, is the written permission of the Director of the Department of Public Safety, rather than the Missouri State Highways and Transportation Commission.

April 18, 1988

OPINION NO. 50-88

The Honorable Ron L. Stivison
Representative, District 20
State Capitol Building, Room 102 BA
Jefferson City, Missouri 65101

Dear Representative Stivison:

This opinion is in response to your question asking:

Whose permission is required for a member of the Highway Patrol to accept compensation, a reward or a gift other than the member's regular salary and expenses as provided in Chapter 43, RSMo. -- the Missouri State Highways and Transportation Commission or the Director of Public Safety?

Section 43.060.2, RSMo 1986, states in part:

43.060. Qualifications of patrolmen and radio personnel and limits on activities. --

* * *

2. No member of the patrol shall hold any other commission or office, elective or appointive, or accept any other employment while he is a member of the patrol. No member of the patrol shall accept any compensation, reward, or gift other than his regular salary and expenses as herein provided except with the written permission of the commission....

The Honorable Ron L. Stivison

It is presumed your question relates to the second sentence of the subsection quoted above and asks whose written permission is required pursuant to that sentence.

Section 43.010(1), RSMo 1986, defines the word "commission" for purposes of Chapter 43, RSMo, as "the Missouri State Highways and Transportation Commission." The Missouri State Highway Patrol was originally under the authority of the Missouri State Highways and Transportation Commission.

However, as part of the Reorganization Act of 1974, the Missouri State Highway Patrol was made a division of the new Department of Public Safety. The applicable provision of the Reorganization Act is now Section 650.005.2, RSMo 1986, which provides:

650.005. Department of public safety
created -- director -- appointment --
department's duties. --

* * *

2. All powers, duties and functions of the state highway patrol, chapter 43, RSMo, and others, are transferred by type II transfer to the department of public safety. The governor by and with the advice and consent of the senate shall appoint the superintendent of the patrol. With the exception of sections 43.100 to 43.120, RSMo, relating to financial procedures, the director of public safety shall succeed the state highways and transportation commission in approving actions of the superintendent and related matters as provided in chapter 43, RSMo. Uniformed members of the patrol shall be selected in the manner provided by law and shall receive the compensation provided by law. Nothing in this act, however, shall be interpreted to affect the funding of appropriations or the operation of chapter 104, RSMo, relating to retirement system coverage or section 226.160, RSMo, relating to workers' compensation for members of the patrol.

(Emphasis added.)

The Honorable Ron L. Stivison

"The primary rule of statutory construction is to ascertain the intent of the lawmakers from the language used to give effect to that intent if possible and to consider words used in the statute in their plain and ordinary meaning." Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397, 401 (Mo. banc 1986), quoting Blue Springs Bowl v. Spradling, 551 S.W.2d 596, 598 (Mo. banc 1977). Where, as here, the language is clear and unambiguous, there is no room for construction. Metro Auto Auction v. Director of Revenue, supra, 707 S.W.2d at 401.

Therefore, by the express language of Section 650.005.2, RSMo 1986, the written permission required in the second sentence of Section 43.060.2, RSMo 1986, for a member of the Patrol to receive compensation, rewards or gifts as a result of the member's performance of his or her duties is the written permission of the Director of the Department of Public Safety rather than the Missouri State Highways and Transportation Commission.

Conclusion

It is the opinion of this office that the written permission referred to in the second sentence of Section 43.060.2, RSMo 1986, is the written permission of the Director of the Department of Public Safety, rather than the Missouri State Highways and Transportation Commission.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

January 29, 1988

OPINION LETTER NO. 51-88

The Honorable Joseph R. Ortwerth
Representative, District 18
State Capitol Building, Room 101H
Jefferson City, Missouri 65101

Dear Representative Ortwerth:

This opinion letter is in response to your question which can be summarized as follows:

Does Article VI, Section 23 of the Missouri Constitution permit a political subdivision of Missouri to retain the capital stock of a for-profit corporation which has been donated to it?

Article VI, Section 23 of the Missouri Constitution (1945), provides "No . . . political corporation or subdivision of the state shall own . . . stock in any corporation" In interpreting this constitutional provision, consideration must be given to its purpose and a reasonable interpretation made of the language used. See Rathjen v. Reorganized School District R-II of Shelby County, 284 S.W.2d 516, 524 (Mo. banc 1955). Unless a contrary intent is shown, the meaning of language used in a constitutional provision is presumed to be its natural and ordinary meaning. Roberts v. McNary, 636 S.W.2d 332, 335 (Mo. banc 1982). Boone County Court v. State, 631 S.W.2d 321, 324 (Mo. banc 1982).

Except in circumstances discussed below, there is no evidence Missouri voters intended the language in Article VI, Section 23 of the Missouri Constitution (1945) to have other than its ordinary and commonly understood meaning. The provision's purposes, according to appellate courts of other states that have construed similar constitutional provisions, include keeping government out of private business, Dade County Board of Public Instruction v. Michigan Mutual Liability Company, 174 So.2d 3, 5-6 (Fla. 1965), restricting the activities

The Honorable Joseph R. Ortwerth

and functions of political subdivisions to government and prohibiting their direct or indirect engagement in commercial enterprise for profit, Bailey v. City of Tampa, 111 So. 119, 120 (Fla. 1926), or entry into private business. State ex rel. Johnson v. Consumers Public Power Dist., 10 N.W.2d 784, 794 (Neb. 1943); Long v. Mayo, 111 S.W.2d 633, 635 (Ky. App. 1937).

It has been held that Article VI, Section 23 of the Missouri Constitution (1945) does not prohibit acquisition by a political subdivision of all capital stock of a corporation solely for the purpose of lawfully acquiring the physical property of the corporation for a legally authorized public use. City of Springfield v. Monday, 185 S.W.2d 788, 792-793 (Mo. banc 1945). See also Brazos River Authority v. Carr, 405 S.W.2d 689, 694 (Tex. 1966); State ex rel. Johnson v. Consumers Public Power Dist., supra at 794; Cawood v. Coleman, 172 S.W.2d 548, 550 (Ky. App. 1943); Long v. Mayo, supra at 635-637; The People ex rel. Murphy v. Kelly, 76 N.Y. 475, 487 (1879). In City of Springfield v. Monday, supra, the Missouri Supreme Court held that a city ordinance authorizing purchase of all the capital stock of a public utility company for the sole purpose of acquiring and operating its physical utility properties and providing for immediate dissolution of the corporation did not violate the constitutional provision prohibiting stock subscription by a political subdivision. Significantly, the city was empowered to own and operate a public utility, and stock purchase was an economical way to acquire the requisite property.

Therefore, it is the opinion of this office that corporate stock donated to the political subdivision must be disposed of within a reasonable time, taking into account the board of directors' fiduciary obligation to maximize the benefit to the political subdivision. It is not possible to precisely quantify what constitutes a reasonable time in a particular case. This will depend upon the relevant facts and circumstances of each situation. Economic reasons for holding the stock until certain action is taken in order to maximize the price or value which may be realized upon the disposition may be taken into account.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General



ATTORNEY GENERAL OF MISSOURI

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WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

March 31, 1988

OPINION LETTER NO. 52-88

The Honorable William E. Lewis
Representative, District 107
State Capitol Building, Room 412C
Jefferson City, Missouri 65101



Dear Representative Lewis:

This opinion letter is in response to your question asking:

Is a taxpayer allowed a partial refund under subsection 5 of section 139.031, RSMo 1986, for property taxes "mistakenly or erroneously paid" if the taxes were paid and within one year thereafter the taxpayer discovers, and the county assessor agrees, that property that was assessed as one classification of personal property should have been assessed as another classification of personal property, which resulted in an overpayment of property taxes?

Subsection 5 of Section 139.031, RSMo 1986, to which you refer, provides as follows:

139.031. Payment of taxes under protest -- action, when commenced, how tried -- refunds, how made -- interest, when allowed -- collector to invest protested taxes, disbursal to taxing authorities, when --

* * *

5. All the county collectors of taxes, and the collector of taxes in any city not within a county, shall, upon

The Honorable William E. Lewis

written application of a taxpayer, refund any real or tangible personal property tax mistakenly or erroneously paid in whole or in part to the collector. Such application shall be filed within one year after the tax is mistakenly or erroneously paid. The governing body, or other appropriate body or official of the county or city not within a county, shall make available to the collector funds necessary to make refunds under this subsection by issuing warrants upon the fund to which the mistaken or erroneous payment has been credited, or otherwise.

Section 139.031 now appears in the 1987 supplement to the Missouri Revised Statutes; however, the subsection about which you are concerned is unchanged.

In Missouri Attorney General Opinion No. 97, Bergbauer, 1970, a copy of which is enclosed, this office considered Section 139.031.4 in effect as of the date of that opinion. Section 139.031.4 in effect as of the date of that opinion is similar to the present Section 139.031.5. In that opinion, this office concluded that subsection 4 (now subsection 5) only applied to errors or mistakes in payment.

The legislature has recognized the fact that while a tax may be legally assessed, errors or mistakes in payment will and do occur as, for example, double payment of the same tax. Id. at page 3.

That opinion then concluded as follows:

Therefore, it is the opinion of this office that it is mandatory for a taxpayer to file suit to compel refund of taxes paid under protest in accordance with the provisions of Sections 1, 2 and 3 of Senate Bill No. 39, 75th General Assembly, (Section 139.031, V.A.M.S.) and the county court is not empowered to take administrative action authorizing the collector to refund such taxes. Section 4 of Senate Bill No. 39 authorizes refund by the collector of any real or tangible personal property tax mistakenly or erroneously paid. Id. at page 4.

The Honorable William E. Lewis

The error about which you are concerned is an error in assessment. The issue is whether Section 139.031.5 can be used to make a refund to a taxpayer where an error in assessment has occurred. In discussing the applicability of Section 139.031 to assessment errors, the Missouri Supreme Court has stated:

[4] The legislature has established a comprehensive system for valuation and assessment of property. The assessor is required to assess property at thirty-three and one-third percent of its true value in money. Section 137.115. The assessment may be appealed to the county board of equalization, § 138.060, and, if the taxpayer is dissatisfied with the decision of the county board, that decision may be appealed to the state tax commission. Section 138.110. Judicial review is thereafter available under the Administrative Procedure Act, Chapter 536. Section 138.470.4. The board of equalization has the power to reduce the assessed valuation of property when, in its opinion, the valuation is higher than its true value as compared with the average valuation of property within the county. Sections 138.050, .100. On appeal to the state tax commission, the commission has the authority to "correct any assessment which is shown to be unlawful, unfair, improper, arbitrary or capricious." Section 138.430.

[5] "The remedy provided by statute is adequate, certain and complete." [Citation omitted.] Where, as is the case here, there is no question of overreaching by the taxing authorities, section 139.031 is not a substitute for the administrative provisions relating to the assessment of property for tax purposes. That section may not be used by the taxpayer to avoid the time limitations of §§ 137.290, 138.090, 138.100, and 138.110. [Citation omitted.] [Emphasis added.] C & D Investment Company v. Bestor, 624 S.W.2d 835, 838 (Mo. banc 1981).


In the situation about which you are concerned, the error that occurred was an error in assessment. A refund pursuant to

The Honorable William E. Lewis

Section 139.031.5 may be made only for property tax mistakenly or erroneously paid. This section does not apply to the situation about which you are concerned.

It is the opinion of this office that a taxpayer may not be allowed a partial refund under Section 139.031.5, RSMo, where the error that resulted in an overpayment of property taxes is an error in assessment such as that in the situation about which you are concerned.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General

Enclosure:

Opinion No. 97, Bergbauer, 1970

DRIVING WHILE INTOXICATED:

JURISDICTION:

JUVENILES:

FINGERPRINTING:

TRAFFIC OFFENSES:

PHOTOGRAPHING ARRESTED PERSONS: 577.010, RSMo 1986, or an equivalent municipal ordinance, without authorization to do so by the juvenile judge, because the offense of driving while intoxicated, first offense, is not a felony, and is not within the jurisdiction of the juvenile court.

Law enforcement officials may fingerprint and photograph a sixteen-year-old charged with a first offense of driving while intoxicated under Section

July 27, 1988

OPINION NO. 53-88

Gary E. Stevenson
Prosecuting Attorney
St. Francois County Courthouse, 3rd Floor
Farmington, Missouri 63640

Dear Mr. Stevenson:

This opinion is in response to your question asking:

Upon the arrest of a sixteen year old for Driving While Intoxicated, First Offense, Section 577.010, R.S.Mo., or Driving While Intoxicated in violation of municipal ordinance, may a law enforcement officer, pursuant to the usual and customary booking procedures of his or her agency, fingerprint and photograph the sixteen year old?

Section 211.031.1, RSMo 1986, provides in part:

Juvenile court to have exclusive jurisdiction when -- exceptions. --
1. Except as otherwise provided herein, the juvenile court shall have exclusive original jurisdiction in proceedings:

* * *

(3) Involving any child who is alleged to have violated a state law or municipal ordinance, or any person who is alleged to have violated a state law or

Gary E. Stevenson

municipal ordinance prior to attaining the age of seventeen years, in which cases jurisdiction may be taken by the court of the circuit in which the child or person resides or may be found or in which the violation is alleged to have occurred; except that, the juvenile court shall not have jurisdiction over any child sixteen years of age who is alleged to have violated a state or municipal traffic ordinance or regulation, the violation of which does not constitute a felony;

(Emphasis added.)

Section 577.010, RSMo 1986, provides:

Driving while intoxicated. -- 1. A person commits the crime of "driving while intoxicated" if he operates a motor vehicle while in an intoxicated or drugged condition.

2. Driving while intoxicated is for the first offense, a class B misdemeanor. No person convicted of or pleading guilty to the offense of driving while intoxicated shall be granted a suspended imposition of sentence for such offense, unless such person shall be placed on probation for a minimum of two years.

Section 211.151, RSMo 1986, provides:

Places of detention -- photographing and fingerprinting restrictions. --

* * *

3. Neither fingerprints nor a photograph shall be taken of a child taken into custody for any purpose without the consent of the juvenile judge.

* * *

The central issue raised by your question is whether driving while intoxicated is a violation of a state traffic ordinance or regulation for purposes of Section 211.031.1, RSMo

Gary E. Stevenson

1986. This office in Opinion No. 112-86, a copy of which is enclosed, concluded that a first offense of driving while intoxicated is a violation of a state traffic ordinance or regulation, the violation of which does not constitute a felony. This is consistent with Section 577.023.1(1), RSMo 1986, which defines an "intoxication-related traffic offense" as "driving while intoxicated, driving with excessive blood alcohol content, driving under the influence of alcohol or drugs in violation of state law."

In Opinion No. 112-86, this office concluded that because a first offense of driving while intoxicated is a state traffic ordinance or regulation, the violation of which does not constitute a felony, a sixteen-year-old committing a first offense of driving while intoxicated is not within the exclusive original jurisdiction of the juvenile court, pursuant to Section 211.031.1(3), RSMo 1986.

In Opinion No. 181, Limbaugh, 1980, a copy of which is enclosed, this office concluded that a sixteen-year-old person arrested for violation of a state or municipal traffic ordinance or regulation, the violation of which does not constitute a felony, who refuses to submit to a chemical test to determine the alcoholic content of his or her blood is subject to statutory provisions relating to penalties for failure to submit to such a test. In that opinion, it was concluded that the procedural protections of the juvenile code are applicable only when the juvenile court has jurisdiction. Consistent with that opinion, Section 211.151.3, RSMo 1986, prohibiting the taking of fingerprints or photographs of a child in custody without the consent of the juvenile judge, would not apply to a sixteen-year-old child's violation of driving while intoxicated, first offense, because this offense is not within the jurisdiction of the juvenile court.

Gary E. Stevenson

Conclusion

It is the opinion of this office that law enforcement officials may fingerprint and photograph a sixteen-year-old charged with a first offense of driving while intoxicated under Section 577.010, RSMo 1986, or an equivalent municipal ordinance, without authorization to do so by the juvenile judge, because the offense of driving while intoxicated, first offense, is not a felony, and is not within the jurisdiction of the juvenile court.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General

Enclosures:

Opinion No. 112-86
Opinion No. 181, Limbaugh, 1980
Opinion Letter No. 20-86

¹Your question is interpreted as limited to fingerprinting and photographing procedures. Therefore, this opinion does not address whether a juvenile arrested for driving while intoxicated, first offense, may be incarcerated. The question of detention of juveniles was addressed in Opinion Letter No. 20-86, a copy of which is enclosed.

CITY RECORDS:
COUNTY RECORDS:
REAL ESTATE ASSESSMENTS:
REAL ESTATE TRANSFERS:
RECORDS:
SUNSHINE LAW:

A certificate of value required to be filed by a city or county ordinance is a public record under the Sunshine Law and is open to the public for inspection and copying.

January 29, 1988

OPINION NO. 54-88

The Honorable Joe Treadway
Representative, District 102
State Capitol Building, Room 410-B
Jefferson City, Missouri 65101

Dear Representative Treadway:

This opinion is in response to your question asking:

Under the Missouri Sunshine Law, Chapter 610, RSMo, would the City of St. Louis, the County of St. Louis, or any other municipality that would have an ordinance or law requiring a certificate of value filing be required to make this information available to the general public?

In your opinion request you state, "[a] new ordinance in the City of St. Louis and in St. Louis County was passed into law requiring a 'Certificate of Value' to be filed with the recorder of deeds stating the actual sales/purchase price of the real estate transaction. The purpose of the new law is to assist the assessors when reassessing."

The Missouri Sunshine Law is contained in Chapter 610, RSMo, and was revised in 1987. Subsection 4 of Section 610.010, RSMo Supp. 1987, defines "public record" as follows:

(4) "Public record", any record retained by or of any public governmental body including any report, survey, memorandum, or other document or study prepared and presented to the public governmental body by a consultant or other professional service paid for in whole or in part by public funds; provided, however, that personally identifiable student records ...

The Honorable Joe Treadway

Section 610.011, RSMo Supp. 1987, provides:

610.011. Liberal construction of law to be public policy. -- It is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law. Sections 610.010 to 610.028 shall be liberally construed and their exceptions strictly construed to promote this public policy.

2. Except as otherwise provided by law, all public meetings of public governmental bodies shall be open to the public as set forth in section 610.020, all public records of public governmental bodies shall be open to the public for inspection and copying as set forth in sections 610.023 to 610.026, and all public votes of public governmental bodies shall be recorded as set forth in section 610.015.

(Emphasis added.)

Under the definition of "public record" contained in subsection 4 of Section 610.010, the certificates of value about which you are concerned are public records. Under Section 610.011, such public records are to be open to the public for inspection and copying. Section 610.021, RSMo Supp. 1987, sets forth various categories of records which may be closed. A review of the categories of records permitted to be closed under Section 610.021 does not reveal any category which would include the certificates of value about which you are concerned. Therefore, under the plain and ordinary meaning of the words of the applicable statutes, certificates of value are public records which are available to the general public for inspection and copying.

This conclusion is further supported by State ex rel. Gray v. Brigham, 622 S.W.2d 734 (Mo. App. 1981). In that case, the Missouri Court of Appeals, Eastern District, held that occupancy permits issued by a city were "public records" subject to inspection and copying by citizens.

The Honorable Joe Treadway

CONCLUSION

It is the opinion of this office that a certificate of value required to be filed by a city or county ordinance is a public record under the Sunshine Law and is open to the public for inspection and copying.

Very truly yours,

A handwritten signature in dark ink, appearing to read "William L. Webster", written in a cursive style.

WILLIAM L. WEBSTER
Attorney General



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

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ATTORNEY GENERAL

P. O. Box 899
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August 3, 1988

OPINION LETTER NO. 59-88

The Honorable Pat Danner
Senator, District 12
State Capitol Building, Room 334
Jefferson City, Missouri 65101

Dear Senator Danner:

This opinion letter is in response to your request for an opinion regarding the authority of the Missouri Public Service Commission to apply and enforce its safety standards for the transportation of gas by pipeline with respect to nonconforming pipeline facilities already constructed and in operation on the date such standards were adopted.

We believe that the determination as to whether or not the Public Service Commission has the authority to act with respect to a particular matter of regulatory concern should be made initially by the Commission itself after it has been afforded an opportunity to fully develop and consider all facts which it may deem relevant to the subject of that inquiry. Persons who have concerns regarding the safety of pipeline facilities should present their concerns to the Commission, which can then inquire into the particular matters of concern and determine for itself whether, and to what extent, and in what manner, it may exercise authority to resolve such concerns. However, we believe that it would be appropriate for us to mention certain considerations which appear pertinent to the subject of pipeline safety regulation.

First, the Federal courts have uniformly held that the authority to establish and enforce safety standards for the interstate transmission of gas by pipeline is vested exclusively in the United States Department of Transportation by virtue of the provisions of the Natural Gas Pipeline Safety Act of 1968 (NGPSA), 49 U.S.C. §§ 1671-1686, as amended. ANR Pipeline Company v. Iowa State Commerce Commission, 828 F.2d 465 (8th Cir. 1987); Natural Gas Pipeline Company of America v. Railroad Commission of Texas, 679 F.2d 51 (5th Cir. 1982);

The Honorable Pat Danner

Tenneco Inc. v. Public Service Commission of West Virginia,
489 F.2d 334 (4th Cir. 1973).

Section 1672 of the NGPSA provides in relevant part as follows:

§ 1672. Federal safety standards

(a) Minimum standards; factors to be considered; State standards; reporting requirements

(1) The Secretary shall, by regulation, establish minimum Federal safety standards for the transportation of gas and pipeline facilities. Such standards may apply to the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities. Standards affecting the design, installation, construction, initial inspection, and initial testing shall not be applicable to pipeline facilities in existence on the date such standards are adopted. Such Federal safety standards shall be practicable and designed to meet the need for pipeline safety. . . .

Any State agency may adopt additional or more stringent safety standards for intrastate pipeline transportation if such standards are compatible with the Federal minimum standards. No State agency may adopt or continue in force any such standards applicable to interstate transmission facilities, after the Federal minimum standards become effective. [Emphasis added.]

* * *

The Secretary of Transportation has established such safety standards. See Minimum Federal Safety Standards, 49 CFR Part 192. Moreover, pursuant to the authority granted by 49 U.S.C. § 1672(a) (1), the Missouri Public Service Commission has adopted the Minimum Federal Safety Standards as its own rules. See 4 CSR 240-40.030.

In ANR Pipeline, the Eighth Circuit held that the NGPSA preempted an Iowa statute which purported to regulate the

The Honorable Pat Danner

construction and operation of both interstate and intrastate pipelines transporting natural gas in and through the state, stating, 828 F.2d at 468:

In the NGPSA, Congress expressly has preempted state regulation of safety in connection with interstate gas pipelines. Although the NGPSA permits the states to "adopt additional or more stringent safety standards for intrastate pipeline transportation if such standards are compatible with the Federal minimum standards," the same section provides that "[n]o State agency may adopt or continue in force any such standards applicable to interstate transmission facilities. . . ." 49 U.S.C. § 1672(a)(1) (emphasis added).

In Natural Gas Pipeline, the Fifth Circuit stated, 679 F.2d at 53:

Section 1672(a)(1) expressly prohibits state adoption or enforcement of safety standards applicable to "interstate transmission facilities." Section 1671(8) defines "interstate transmission facilities" as:

pipeline facilities used in the transportation of gas which are subject to the jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act, except that it shall not include any pipeline facilities within a State which transport gas from an interstate gas pipeline to a direct sales customer within such State purchasing gas for its own consumption.

"Transportation of gas" is defined in § 1671(3) as:

the gathering, transmission or distribution of gas by pipeline or its storage in interstate or foreign commerce; except that it shall not include the gathering of gas in those rural locations which lie outside the limits of any incorporated or

The Honorable Pat Danner

unincorporated city, town, village, or any other designated residential or commercial area such as a subdivision, a business or shopping center, a community development, or any similar populated area which the Secretary may define as a nonrural area.

Second, it appears that the preemption applies even though a state, by statute or regulation, has adopted safety standards identical to the Minimum Federal Safety Standards promulgated by the Secretary of Transportation. ANR Pipeline Company v. Iowa State Commerce Commission, 828 F.2d at 469[1]; Northern Border Pipeline Company v. Jackson County, Minnesota, 512 F.Supp. 1261, 1265 (D.Minn. 1981); United Gas Pipeline Company v. Terrebonne Parish Police Jury, 319 F.Supp. 1138, 1141[4] (E.D.La. 1970), aff'd. 445 F.2d 301 (5th Cir. 1971).

In ANR Pipeline, the Iowa Commission argued that because it had adopted as its own regulations the Minimum Federal Safety Standards, its authority to regulate was not preempted, to which contention the court responded as follows:

We find no merit in this argument. The portions of the legislative history quoted above make clear that Congress intended to preclude states from regulating in any manner whatsoever with respect to the safety of interstate transmission facilities. We agree with the conclusion reached by the District Court, and by the courts in Natural Gas Pipeline and Terrebonne Parish, that the NGPSA leaves nothing to the states in terms of substantive safety regulation of interstate pipelines, regardless of whether the local regulation is more restrictive, less restrictive, or identical to the federal standards.

828 F.2d at 470.

Under the NGPSA, the authority to regulate the safety of construction and operation of interstate gas pipelines is given solely to the Secretary of Transportation, and Iowa is not free to regulate in this area, even if it adopts standards identical to the federal standards.

The Honorable Pat Danner

828 F.2d at 472.

Finally, we observe that § 1672(a)(1) of the NGPSA states explicitly that:

Standards affecting the design, installation, construction, initial inspection, and initial testing shall not be applicable to pipeline facilities in existence on the date such standards are adopted.

However, we also note that § 192.13(b) of the Minimum Federal Safety Standards provides that:

No person may operate a segment of pipeline that is replaced, relocated, or otherwise changed after November 12, 1970, . . . unless that replacement, relocation, or change has been made in accordance with this part.

Thus, it appears that safety standards relating to design, installation and construction of pipelines cannot be applied retroactively to facilities already in place, but may be applied to a segment of pipeline that is replaced, relocated, or otherwise changed after the adoption of such standards.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

AMBULANCE DISTRICTS:
CANDIDACY FILINGS:
CANDIDATES:
COUNTY CLERK:
ELECTIONS:

Pursuant to Section 190.050, RSMo 1986, a candidate for election to the initial or subsequent board of directors of an ambulance district should file his declaration of candidacy with the county clerk.

June 7, 1988

OPINION NO. 66-88

Robert J. Seek
Miller County Prosecuting Attorney
Courthouse Annex
Tuscumbia, Missouri 65082

Dear Mr. Seek:

This opinion is in response to your question asking:

Should a candidate for election to the board of directors of a county ambulance district organized pursuant to Chapter 190 RSMo file his declaration of candidacy with the county clerk or with a person designated by the board of the district?

In Missouri Attorney General Opinion Letter No. 156, Port, 1974, this office addressed the same issue. In that opinion this office determined that the provisions of Section 190.050, RSMo in effect at that time, applied only to the filing requirements for candidates to the initial board of directors. Thus, the opinion concluded that in subsequent elections, declarations of candidacy should be filed with the board of the district. Because of changes in Section 190.050 subsequent to the 1974 opinion, we are now withdrawing that opinion.

Section 190.050, RSMo 1986, provides in part:

190.050. Election districts, how established --election of directors, terms, qualifications -- exception (excludes Jefferson County from having districts).--1. . . . The county commission shall cause an election to be held in the ambulance district within ninety days after the order establishing the ambulance district to elect ambulance district directors. . . . The directors elected from districts one and four shall serve for a term of one year, the directors elected from districts two and five shall serve for a term of

two years, and the directors from districts three and six shall serve for a term of three years; thereafter, the terms of all directors shall be three years. All directors shall serve the term to which they were elected or appointed, and until their successors are elected and qualified, except in cases of resignation or disqualification. . . .

2. In all counties of the second class having more than one hundred five thousand inhabitants located adjacent to a county of the first class having a charter form of government which does not contain any part of a city of over four hundred fifty thousand inhabitants, the voters shall vote for six directors elected at large from within the district for a term of three years. Those directors holding office in any district in such a county on August 13, 1976, shall continue to hold office until the expiration of their terms, and their successors shall be elected from the district at large for a term of three years. In any district formed in such counties after August 13, 1976, the governing body of the county shall cause an election to be held in that district within ninety days after the order establishing the ambulance district to elect ambulance district directors. Each voter shall vote for six directors. The two candidates receiving the highest number of votes at such election shall be elected for a term of three years, the two candidates receiving the third and fourth highest number of votes shall be elected for a term of two years, the two candidates receiving the fifth and sixth highest number of votes shall be elected for a term of one year; thereafter, the term of all directors shall be three years.

3. A candidate for director of the ambulance district shall, at the time of filing, be a citizen of the United States, a qualified voter of the election district as provided in subsection 1 of this section, a resident of the state for one year next preceding the election, and shall be at least twenty-one years of age. A candidate shall file his declaration of candidacy with the county clerk of the county in which he resides. A candidate shall file a statement under oath that he possesses the required qualifications. No candidate's name shall be printed on any official

Robert J. Seek

ballot unless the candidate has filed a written declaration of candidacy by 5:00 p.m. on the eighth Tuesday prior to the election. (Emphasis added.)

In interpreting a statute, the fundamental rule is to ascertain the intent of the General Assembly from the language used and to give effect to that intent. Brown Group, Inc. v. Administrative Hearing Commission, 649 S.W.2d 874, 881 (Mo. banc 1983). The plain meaning of the statutory language is to be given effect whenever possible. State ex rel. D.M. v. Hoester, 681 S.W.2d 449, 450 (Mo. banc 1984). Based on the provisions of Section 190.050, RSMo 1986, now in effect, we conclude that such section now applies to all elections of ambulance district board members, not simply the initial election of board members. In particular, it should be noted that subsection 2 of this statute makes reference to the election of successor board members in particular counties. Also, subsection 3 no longer refers to "the special election" as it did in 1974. Instead, that subsection now refers simply to "the election" which implies that it pertains to all elections, not simply the first one. Moreover, subsection 3 also now includes the following language: "No candidate's name shall be printed on any official ballot unless. . . ." (Emphasis added.) Implicit in the use of the term "any official ballot" is the idea that it includes more than just the ballot used in the initial election. The word "any" is all comprehensive and the equivalent to "every." State ex rel. Randolph County v. Walden, 206 S.W.2d 979, 983 (Mo. banc 1947). Having concluded such section now applies to all elections of ambulance district board members, not simply the initial election of board members, pursuant to that section a candidate shall file his declaration of candidacy with the county clerk.

Conclusion

It is the opinion of this office that pursuant to Section 190.050, RSMo 1986, a candidate for election to the initial or subsequent board of directors of an ambulance district should file his declaration of candidacy with the county clerk.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

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P. O. Box 899
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November 21, 1988

OPINION LETTER NO. 67-88

The Honorable Fred B. Brummel
Representative, District 71
1124 Hoyt Drive
Bellefontaine Neighbors, Missouri 63137

Dear Representative Brummel:

This opinion letter is in response to certain of your questions concerning the operation of bingo games by an American Legion Post in St. Louis County. The information you have provided indicates as follows: The American Legion Post is licensed by the Missouri Department of Revenue to conduct bingo games. The games are conducted on premises owned by a separate not-for-profit association whose membership is restricted to members of the American Legion Post. The not-for-profit association has established a fee schedule for use of the premises which fee is charged the American Legion Post when it conducts bingo games and is charged to other groups when such other groups use the premises. Your first question asks if it is legally permissible for the American Legion Post to donate money from the bingo games it conducts to the not-for-profit association which donations are in addition to the fee charged for the use of the premises.

Further investigation reveals that the not-for-profit association is incorporated under Chapter 355 of the Missouri Revised Statutes, the general not-for-profit corporation law. The purpose clause of the articles of incorporation of the association states that it is organized to provide and maintain a building for the use and occupancy of the American Legion Post, specifically including the use of the building for all lawful and legal purposes commensurate with an American Legion Post, and for all other legal powers permitted a general not-for-profit corporation.

Subsection 1 of Section 313.040, RSMo Supp. 1987, provides:

The Honorable Fred B. Brummel

313.040. Restrictions.--The conducting of bingo is subject to the following restrictions:

(1) The entire net receipts over and above the actual cost of conducting the game shall be exclusively devoted to the lawful, charitable, religious or philanthropic purposes of the organization permitted to conduct that game and no receipts shall be used to compensate in any manner any person who works for or is in any way affiliated with the licensed organization. Proceeds from the game of bingo may not be loaned to any person; provided, however, that this provision shall not prohibit the investment of the proceeds in any licensed banking or savings institution, instrument of the United States, Missouri or any political subdivision thereof. The actual cost of conducting the game shall only include the cost of the prizes, the purchasing or renting of the bingo cards, the purchasing or leasing of the equipment used in conducting the game, the lease rental on the premises in which the game is conducted to include an allocation of utility costs, if applicable, costs of providing security, including the employment of a reasonable number of security personnel at a compensation not to exceed fifty dollars per person for each day on which bingo is conducted and such personnel is actually present and engaged in security duties, and bookkeeping and accounting expenses;

Subsection 1 of Section 313.025, RSMo 1986, provides:

313.025. Leases, approval by director--percentage of gross receipts as rent prohibited--lessors and suppliers may not operate games.--1. If any applicant for licensure or organization licensed under sections 313.005 to 313.080 proposes to conduct bingo on leased premises or use leased equipment, the terms of the lease

The Honorable Fred B. Brummel

shall be reduced to writing and a copy of the lease shall be submitted to the director of revenue. The director shall have the authority to approve or disapprove any such lease. No lease which has been approved by the director of revenue shall be amended, modified or renewed in any manner until such amendments, modifications or renewals have been approved by the director of revenue. No lease providing for a rental arrangement for premises or equipment for use in the game shall provide for payment in excess of the reasonable market rental rate for such premises or equipment and in no case shall any payment be based on a percentage of gross receipts or proceeds. The reasonable market rental rate shall be determined by the director of revenue.

We presume that the fee charged by the not-for-profit association to the American Legion Post for the use of the premises when conducting bingo games is not in excess of the "reasonable market rental rate" as determined by the Director of Revenue pursuant to Section 313.025.

Based on the information obtained, we conclude that the American Legion Post may donate money from the bingo games it conducts to its affiliated not-for-profit association in addition to the fees charged for the use of the premises. Under Chapter 355, a not-for-profit corporation may be organized for many purposes: charitable, benevolent, eleemosynary, educational, civic, patriotic, political, religious, cultural, social welfare, etc. See Section 355.025, RSMo 1986. Among the powers granted to such a corporation is the power to receive and take by gift or otherwise any real or personal property for charitable, religious, educational, scientific or benevolent purposes and for such other purposes as may be necessary and proper for carrying on its legitimate affairs. See Section 355.090(5), RSMo 1986. The purpose for this association, as stated in its articles of incorporation, is to provide and maintain a building for the use and occupancy of an American Legion Post and to use that building for all lawful and legal purposes commensurate with an American Legion Post. Since the post has specific authority to conduct bingo games under licensure from the Director of Revenue pursuant to Section 313.015, RSMo 1986, and the definition of "veterans

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organization" in Section 313.005(9), RSMo 1986, the donation of funds from bingo receipts in addition to the rental fees by the American Legion Post to its affiliated association does not violate the restrictions contained in Section 313.040. Ownership and maintenance of a building by an organization, whether directly or indirectly through an affiliated association whose purpose is to provide a building for that organization's use, is a lawful purpose of that organization.

Your second question concerns the issuance pursuant to Section 313.015, RSMo 1986, of special licenses to celebrate special events. Section 313.015 provides for the issuance of special licenses. The applicable provision in such section provides:

The director may, upon application made by a county fair organization or by any organization qualified to receive a regular license, issue a special license authorizing such organization to conduct bingo for the period of any fair, picnic, festival or celebration conducted by such qualified organization not exceeding one week and which is held not more than once annually, and a special licensee shall be exempt from the provisions of subdivisions (7) and (12) of section 313.040. Each organization receiving a special license shall pay to the director of revenue a fee of twenty-five dollars, to be paid into the state treasury to the credit of the general revenue fund.

Subsections 7 and 12 of Section 313.040, RSMo Supp. 1987, to which Section 313.015 refers, provide:

313.040. Restrictions.--The conducting of bingo is subject to the following restrictions:

* * *

(7) The number of bingo days conducted by a licensee under the provisions of sections 313.005 to 313.080 shall be limited to one day per week;

The Honorable Fred B. Brummel

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(12) A person who meets the same qualifications of sections 313.005 to 313.080 as a licensee may lease premises he owns, leases or otherwise is empowered to lease to no more than three licensees per calendar week; and a person who does not meet the qualifications of a licensee may lease premises he owns, leases or otherwise is empowered to lease to no more than one licensee per calendar week; provided, however, a licensee may lease premises he leases to other licensees, but the lease payment shall be no more than the prorated amount the original lessee pays or is charged for the same time under his lease; except that, under no circumstances may bingo be conducted on any single premise or location more than four times during any one week;

Your opinion request states:

In the past year, the legion post has been obtaining special bingo permits in accordance with section 313.015 to celebrate contrived events that have no past history, no current or planned future significance to the American Legion. Special permits have been obtained to conduct bingo games in recognition of events such as Mother's Day, Labor Day, Thanksgiving, New Year's, etc. These games do not augment any other activity to recognize these days as being a special significance. These games exist solely to circumvent the total number of bingo games that may be conducted in any given week and the games net proceeds may be used in part to pay off the post's outstanding indebtedness.

Through the opinions process, this office can only address questions of law. The matter about which you are concerned is a question of fact as to whether a given special license is "for the period of any fair, picnic, festival or celebration

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conducted by such qualified organization not exceeding one week and which is held not more than once annually." Whether a given application for a special license meets the statutory requirements is a matter to be determined by the Director of Revenue in each instance.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General

CHARITABLE CORPORATIONS: Organizations such as the
CHARITIES: American Legion, Elks Lodge and
FRATERNAL BENEFIT SOCIETIES: others which have tax exemptions
recognized by the Internal
Revenue Service under Section 501(c)(7) or Section 501(c)(8) and
solicit funds for "charitable purposes" by way of commonly used
fund-raising methods are subject to the registration require-
ments of Sections 407.450 to 407.478, RSMo 1986, unless the
solicitation of funds is limited to the membership of the
organization itself.

January 29, 1988

OPINION NO. 68-88

The Honorable Marvin Proffer
Representative, District 158
State Capitol Building, Room 306
Jefferson City, Missouri 65101

Dear Representative Proffer:

This opinion is in response to your question asking:

Do organizations, such as the American Legion, Elks Lodge, and others, which have income tax exemptions recognized by the IRS under sections 501(c)(7) and 501(c)(8) have to register under sections 407.450 to 407.478, RSMo before they raise money for charitable purposes by way of raffles, walk-a-thons, sales, or other commonly used fund-raising methods?

Sections 407.450 to 407.478, RSMo 1986, are collectively known as the "Charitable Organizations and Solicitations Law". Under the provisions of the "Charitable Organizations and Solicitations Law" any charitable organization soliciting funds for a charitable purpose in the State of Missouri must register with the Missouri Attorney General's office unless otherwise exempted from such registration.

In order to determine whether an organization recognized by the Internal Revenue Service as having Section 501(c)(7) or Section 501(c)(8) status is subject to the registration provisions of Sections 407.450 to 407.478, it is necessary to establish whether such organization and its activities fall within the statutory definitions.

The Honorable Marvin Proffer

Section 407.453 defines the terms used throughout the "Charitable Organizations and Solicitations Law". Under Section 407.453(1), the term "charitable organization" is defined as:

(1) "Charitable organization", any person, as defined in section 407.010, who does business in this state or holds property in this state for any charitable purpose and who engages in the activity of soliciting funds or donations for, or purported to be for, any fraternal, benevolent, social, educational, alumni, historical or other charitable purpose;

Subsection (2) of Section 407.453 establishes the meaning of "charitable purpose" as:

(2) "Charitable purpose", any purpose which promotes, or purports to promote, directly or indirectly, the well-being of the public at large or any number of persons, whether such well-being is in general or limited to certain activities, endeavors or projects;

"Solicitation" as defined in Section 407.453(6) is:

(6) "Solicitation", any request or appeal, either oral or written, or any endeavor to obtain, seek or plead for funds, property, financial assistance or other thing of value, including the promise or grant of any money or property of any kind or value for a charitable purpose, but excluding:

(a) Direct grants or allocation of funds received or solicited from any affiliated fund-raising organization by a member agency; and

(b) Unsolicited contributions received from any individual donor, foundation, trust, governmental agency or other source, unless such contributions are received in conjunction with a solicitation drive.

A 501(c)(7) organization is one which is "organized for pleasure, recreation, and other nonprofitable purposes,

The Honorable Marvin Proffer

substantially all of the activities of which are for such purposes and no part of the net earnings of which inures to the benefit of any private shareholder". 26 U.S.C. Section 501(c)(7). Similarly, fraternal beneficiary societies, orders or associations receive tax exempt 501(c)(8) status when:

(8) Fraternal beneficiary societies, orders, or associations --

(A) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and

(B) providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents.

26 U.S.C. Section 501(c)(8).

Since admittedly the 501(c)(7) and 501(c)(8) organizations which are the subject of your opinion request are soliciting funds for "charitable purposes," such organizations would be required to register under Sections 407.450 to 407.478, RSMo, unless otherwise exempted. The registration requirement applies not only to the organization itself but also to any professional fund raiser employed by it.

Section 407.456.2 lists the exceptions to the registration requirement and are as follows:

2. The provisions of sections 407.459 and 407.462, and subsection 1 of section 407.469 shall not apply to the following:

(1) Religious organizations;

(2) Educational institutions and their authorized and related foundations;

(3) Fraternal, benevolent, social, educational, alumni, and historical organizations, and any auxiliaries associated with any of such organizations, when solicitation of contributions is confined to the membership of such organizations or auxiliaries;

The Honorable Marvin Proffer

(4) Hospitals and auxiliaries of hospitals, provided all fund-raising activities and solicitations of contributions are carried on by employees of the hospital or members of the auxiliary and not by any professional fundraiser who is employed as an independent contractor;

(5) Any solicitation for funds governed by chapter 130, RSMo; and

(6) Any organization that has obtained an exemption from the payment of federal income taxes as provided in section 501(c)(3) of title 26, United States Code, as amended, if, in fact, no part of the net earnings of the organization inure to the benefit of any private party or individual associated with such organization.

The exemptions from registration are specific and with the exception of subsection 3 would not provide an exemption for the type of organization in question. Subsection 3 would provide an exemption from registration for a 501(c)(7) or 501(c)(8) organization if the solicitation of funds for charitable purposes is confined to the members of that organization. For example, if the Elks Lodge or American Legion were soliciting funds strictly from the confines of their own membership, then the registration provisions of Sections 407.450 to 407.478 would not apply.

CONCLUSION

It is the opinion of this office that organizations such as the American Legion, Elks Lodge and others which have tax exemptions recognized by the Internal Revenue Service under Section 501(c)(7) or Section 501(c)(8) and solicit funds for "charitable purposes" by way of commonly used fund-raising methods are subject to the registration requirements of Sections 407.450 to 407.478, RSMo 1986, unless the solicitation of funds is limited to the membership of the organization itself.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751 3321

January 13, 1988

OPINION LETTER NO. 69-88

The Honorable Roy D. Blunt
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101


Dear Secretary Blunt:

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo 1986, for sufficiency as to form of an initiative petition relating to the amendment of Article III, Section 39(b) of the Missouri Constitution, which section concerns the state lottery. A copy of the initiative petition and the proposed amendment which you submitted to this office on January 5, 1988, are attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. See Moore v. Brown, 165 S.W.2d 657 (Mo. banc 1942). Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General

Enclosure

It is a class A misdemeanor for anyone to sign any initiative petition with any name other than his own, or knowingly to sign his name more than once for the same measure for the same election, or to sign a petition when he knows he is not a registered voter.

INITIATIVE PETITION

To the Honorable Roy D. Blunt, Secretary of State for the state of Missouri:

We the undersigned, registered voters of the state of Missouri and of _____ County (or city of St. Louis), respectfully order that the following proposed amendment to the constitution shall be submitted to the voters of the state of Missouri, for their approval or rejection, at the general election to be held on the 8th day of November, 1988, and each for himself says: I have personally signed this petition; I am a registered voter of the state of Missouri and _____ County (or city of St. Louis); my registered voting address and the name of the city, town or village in which I live are correctly written after my name.

CIRCULATOR'S AFFIDAVIT

STATE OF MISSOURI
COUNTY OF _____

I, _____, a Missouri registered voter and a resident of the state of Missouri, being first duly sworn, say (print or type names of signers)

REGISTERED VOTING

ADDRESS

(Street) (City,
Town or Village)

ZIP
CODE

CONGR.
DIST.

NAME
(Printed or
typed)

1.	_____	____/____/____	_____	_____	_____	_____
2.	_____	____/____/____	_____	_____	_____	_____
3.	_____	____/____/____	_____	_____	_____	_____
4.	_____	____/____/____	_____	_____	_____	_____
5.	_____	____/____/____	_____	_____	_____	_____
6.	_____	____/____/____	_____	_____	_____	_____
7.	_____	____/____/____	_____	_____	_____	_____
8.	_____	____/____/____	_____	_____	_____	_____
9.	_____	____/____/____	_____	_____	_____	_____
10.	_____	____/____/____	_____	_____	_____	_____
11.	_____	____/____/____	_____	_____	_____	_____
12.	_____	____/____/____	_____	_____	_____	_____
13.	_____	____/____/____	_____	_____	_____	_____
14.	_____	____/____/____	_____	_____	_____	_____
15.	_____	____/____/____	_____	_____	_____	_____
16.	_____	____/____/____	_____	_____	_____	_____
17.	_____	____/____/____	_____	_____	_____	_____
18.	_____	____/____/____	_____	_____	_____	_____
19.	_____	____/____/____	_____	_____	_____	_____
20.	_____	____/____/____	_____	_____	_____	_____

signed this page of the foregoing petition, and each of them signed his name thereto in my presence; I believe that each has stated his name, registered voting address and city, town or village correctly, and that each signer is a registered voter of the state of Missouri and _____ County.

Signature of Affiant
(Person obtaining signatures)

Subscribed and sworn to before me this _____ day of _____, A.D., 19__.

Signature of Notary

Notary Public (Seal)

My commission expires _____.

INITIATIVE PETITION TO AMEND ARTICLE III OF THE CONSTITUTION OF MISSOURI

--TITLE--

SHALL, Article III, Section 39(b), of the Missouri Constitution be amended to create in the State Treasury the "Missouri Lottery Fund for Education" to which proceeds from the Lottery will be transferred for subsequent appropriation by the General Assembly for support of education.

To amend article III of the Constitution of Missouri by repealing section 39(b) thereof relating to the state lottery and adopting one new section in lieu thereof relating to the same subject.

BE IT RESOLVED BY THE PEOPLE OF THE STATE OF MISSOURI THAT THE CONSTITUTION OF MISSOURI BE AMENDED AS FOLLOWS:

Section 1. Section 39(b) of article III of the Constitution of Missouri is repealed and one new section adopted in lieu thereof to be known as section 39(b), to read as follows:

Section 39(b). 1. There is hereby created and established as a governmental instrumentality of the State of Missouri, the "Missouri State Lottery Commission", which shall constitute a body corporate and politic.

2. The Commission is authorized to conduct a Missouri State Lottery, and shall, on a monthly basis, transfer the proceeds thereof to the State of Missouri and to the credit of the "Missouri Lottery Fund for Education", which is hereby created in the state treasury. Amounts in the "Missouri Lottery Fund for Education" shall not be transferred to

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Ray D. Bryant
SEC. OF STATE

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the general revenue fund, but shall be appropriated by the general assembly for purposes that the general assembly determines will enhance or support the quality of education in this state.

3. The Commission shall consist of five members appointed by the Governor. The advice and consent of the Senate shall not be required. At the time of his appointment, each member shall have been a resident of this state for a period of at least five years preceding his appointment. No more than three members of the Commission shall be members of the same political party. Members of the Commission shall have six-year terms except the initial members, one of whom shall be appointed for a term of two years, one for a term of three years, one for a term of four years, one for a term of five years, and one for a term of six years. No person shall be appointed as a Commissioner who has been convicted of a felony or gambling related offense. The Governor may remove any Commissioner for cause. Members of the Commission shall have no salary but shall receive their actual expenses incurred in the performance of their responsibilities. The Commission shall employ such persons as necessary, and shall be the sole authority to promulgate and implement rules, regulations and policies for the establishment and operation of a state lottery. The Commission shall have the authority to join other states and jurisdictions for the purpose of conducting joint lottery games.

4. The Commission shall select one of its members as Chairman and another as Vice Chairman and shall appoint a Secretary and a Treasurer, which offices may be combined, and who need not be members of the Commission.

5. The Commission is hereby granted and may exercise all powers necessary or appropriate to carry out and effectuate its purposes pursuant to this section, including, but not limited to, the following:

(1) To adopt an official seal;

(2) To maintain a principal office and such other offices within the state as it may designate;

(3) To sue and be sued;

(4) To make and execute leases, contracts, releases, compromises and other instruments necessary or convenient for the exercise of its powers or to carry out its purposes;

(5) To acquire, construct, reconstruct, enlarge, improve, furnish, equip, maintain, repair, operate, lease, finance and sell equipment, structures, systems and projects in the exercise of its powers and to lease the same to any private person, firm, or corporation, or to any public body, political subdivision or municipal corporation;

(6) To acquire by gift or purchase, hold and dispose of real and personal property in the exercise of its powers and the performance of its duties hereunder;

(7) To employ managers and other employees and retain or contract with architects, engineers, accountants, financial consultants, attorneys and such other persons, firms or corporations who are necessary in its judgment to carry out its duties, and to fix the compensation thereof;

(8) To receive and accept appropriations, bequests, gifts and grants and to utilize or dispose of the same to carry out its purposes pursuant to the provisions of this section; and

(9) To take such other action, enter into such agreements and exercise all other powers and functions necessary or appropriate to carry out its duties and purposes.

6. No part of the funds of the Commission shall inure to the benefit of or be distributable to its members or other private persons except that the Commission is authorized and empowered to pay reasonable compensation for services rendered.

7. Upon termination or dissolution, all rights and properties of the Authority shall pass to and be vested in the State of Missouri, subject to the rights of Commission creditors.

8. A minimum of 50 percent of the money received from the sale of Missouri Lottery tickets shall be used by the Missouri State Lottery Commission for the purpose of funding prizes. Other amounts may be used as the Missouri State Lottery Commission deems appropriate for compensation to sellers of Lottery tickets, administration, advertising and promotion.

9. The Commission is authorized to conduct advertising and promotions, and there shall be no other limitations imposed by law to restrict the scope or content of advertising and promotion. Advertising conducted by the Commission shall not be false or fraudulent.

10. The Commission shall employ an independent firm of accountants to conduct an annual audit of all accounts and transactions of the Lottery. The report of each audit shall be submitted to the Governor, the General Assembly, the Commissioner of Administration, the State Treasurer, Attorney General, and the State Auditor.

11. Revenues transferred to the State of Missouri from the State Lottery Commission shall not be part of the "total state revenues" as

defined in Sections 17 and 18 of Article X of this Constitution and the expenditures of such revenues shall not be an "expense of state government" under Section 20 of Article X of this Constitution.



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

February 8, 1988

OPINION LETTER NO. 70-88

The Honorable Jeremiah W. (Jay) Nixon
Senator, District 22
State Capitol Building, Room 330
Jefferson City, Missouri 65101



Dear Senator Nixon:

This opinion letter is in response to your questions asking:

Do the provisions of the Missouri State Constitution specifically prohibit pari mutuel wagering on dog racing? If not, may the General Assembly provide statutory authority for pari mutuel wagering on dog racing?

Your first question asks whether the provisions of the Missouri State Constitution specifically prohibit pari mutual wagering on dog racing. The provision about which you are concerned is Article III, Section 39(9) of the Missouri Constitution. Such section provides:

Section 39. Limitation of power of general assembly. The general assembly shall not have power:

★ ★ ★

(9) Except as otherwise provided in section 39(b) or section 39(c) of this article, to authorize lotteries or gift enterprises for any purpose, and shall enact laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; except that, nothing in this section shall be so construed as to prevent or prohibit citizens of this state from participating in games or contests of skill or chance

The Honorable Jeremiah W. (Jay) Nixon

where no consideration is required to be given for the privilege or opportunity of participating or for receiving the award or prize and the term "lottery or gift enterprise" shall mean only those games or contests whereby money or something of value is exchanged directly for the ticket or chance to participate in the game or contest. The general assembly may, by law, provide standards and conditions to regulate or guarantee the awarding of prizes provided for in such games or contests under the provision of this subdivision.

The Missouri Supreme Court extensively discussed this section in Barnes v. Bailey, 706 S.W.2d 25 (Mo. banc 1986). The court stated:

[6] Underlying appellant's entire argument in this case is the assumption that all gambling, including horse racing, is prohibited by our Constitution under Art. III, § 39(9). This Court has never before addressed this question. We believe it is appropriate to comment upon this unresolved constitutional question, because this case involves the question of whether the legislature is prohibited under our Constitution from appropriating funds for pari-mutuel wagering.

* * *

The history of Missouri clearly indicates that, as in the other jurisdictions, the prohibition against lotteries and gift enterprises never included within its terms horse racing. . . . Well after lotteries and gift enterprises became illegal, horse racing and betting thereon was legal if conducted in accordance with various state regulations. See generally Aquamsi Land Co. v. City of Cape Girardeau, 346 Mo. 524, 142 S.W.2d 332, 336 (1940); State v. Delmar Jockey Club, 200 Mo. 34, 92 S.W. 185 (1905); State v. Thompson, 160 Mo. 333, 60 S.W. 1077 (1901); State v. Thomas, 138 Mo. 95, 39

The Honorable Jeremiah W. (Jay) Nixon

S.W. 481 (1897). For example, horse racing and betting was permitted if conducted within this state by a licensed operator. §§ 2191, 7419-22, RSMo 1899.

During the debates at the 1943-1944 State Constitutional Convention, the delegates were in agreement that the prohibition against lotteries and gift enterprises did not include other forms of gambling, such as horse racing. The question arose whether the amendment should be stricken out of the Constitution. Mr. Hullverson argued that the subject matter was more properly left to the legislature than to a constitutional amendment. He queried those seeking to retain the amendment why they did not also want to include all gambling devices, such as horse racing, in the Constitution. Mr. Hanks replied that a line had to be drawn and a lottery was particularly destructive. He added:

The difference is this, Mr. Hullverson, if you will listen carefully, I think I'll tell you. In the hands of local law enforcement authorities is the power, under the criminal code, to suppress the things you speak of, but when you strike this Section from the Constitution as you propose to do, it invites your General Assembly to search for a method of raising high sums and to do it by lottery instead of by the sources of revenue of taxation purposes. Now, that's the difference. On the one hand you have a purely local criminal code. Upon the other hand you have public policy, and it is with respect to that this particular Section ought to be retained.

Later in the discussion, Mr. Allen stated:

The Honorable Jeremiah W. (Jay) Nixon

I am not in favor of the lotteries. Neither am I in favor of the state going into the horse-racing business like Florida has, but there is no provision in this Constitution, or has one been offered, to keep us out of the horse-racing business.

Debates of the Missouri Constitution 1945, at 1132-43. This analysis of our constitutional limitation against lotteries or gift enterprises points out the error in appellant's assumption, and it further illustrates the legislative power to authorize the expenditure of the funds.

Normally, we seek to resolve all of our cases on the narrowest ground possible. While we have no doubt that the power of the legislature to appropriate funds for pari-mutuel wagering is fully sustainable on this ground alone, the fact that the people have favorably expressed their opinion on Amendment No. 7 makes our examination of the effect of that amendment on our Constitution totally appropriate in this instance. Whether Amendment No. 7 was necessary or not, the attention focused on this matter by the citizens of Missouri will, we hope, have the salutary effect of making Missouri one of the best regulated states in the nation as far as pari-mutuel wagering is concerned. [Emphasis in original.] Id. at 30-33.

This discussion by the Missouri Supreme Court makes it clear that the prohibition against lotteries and gift enterprises in Article III, Section 39(9) of the Missouri Constitution does not prohibit other forms of gambling, such as horse racing or, in the case about which you are concerned, dog racing. Therefore, based upon the discussion of this constitutional provision by the Missouri Supreme Court, it is our opinion that the Missouri State Constitution does not specifically prohibit pari mutuel wagering on dog racing. While it is preferable in our view to enact a specific constitutional amendment to address pari mutuel wagering on dog racing, the language in Barnes v. Bailey, supra, indicates such amendment is not necessary.

The Honorable Jeremiah W. (Jay) Nixon

Your second question asks whether the General Assembly may provide statutory authority for pari mutuel wagering on dog racing. The power of the General Assembly is discussed by the Missouri Supreme Court in Americans United v. Rogers, 538 S.W.2d 711 (Mo. banc 1976), cert. denied 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed. 2d 632 (1976):

[1-3] When considering an attack on the constitutionality of a legislative enactment, we are guided by the established principle that: "The state constitution, unlike the federal constitution, is not a grant of power, but as to legislative power, it is only a limitation; and, therefore, except for the restrictions imposed by the state constitution, the power of the state legislature is unlimited and practically absolute. Kansas City v. Fishman, 362 Mo. 352, 241 S.W.2d 377 (1951). An act of the legislature is presumed to be valid and will not be declared unconstitutional unless it clearly and undoubtedly contravenes some constitutional provision. State ex rel. Eagleton v. McQueen, 378 S.W.2d 449 (Mo. banc 1964). Legislative enactments should be recognized and enforced by the courts as embodying the will of the people unless they are plainly and palpably a violation of the fundamental law of the constitution. [Citations omitted.] Id. at 716.

A statute is presumed to be constitutional and will not be declared unconstitutional unless it clearly and undoubtedly violates some constitutional provision. C.L.P. v. Pate, 673 S.W.2d 18 (Mo. banc 1984); State v. Hampton, 653 S.W.2d 191 (Mo. banc 1983). A statute has a presumption of constitutionality. Westin Crown Plaza Hotel Company v. King, 664 S.W.2d 2 (Mo. banc 1984). Therefore, it is our opinion that the General Assembly may provide statutory authority for pari mutuel wagering on dog racing.

The Honorable Jeremiah W. (Jay) Nixon

It is the opinion of this office that (1) the Missouri State Constitution does not specifically prohibit pari mutuel wagering on dog racing and (2) the General Assembly may provide statutory authority for pari mutuel wagering on dog racing. However, we do not view it inappropriate to have the people specifically speak to this issue through the ballot box.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

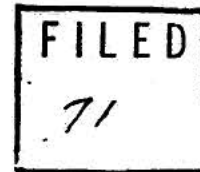
WILLIAM L. WEBSTER
ATTORNEY GENERAL

P.O. Box 899
(314) 751-3321

January 21, 1988

OPINION LETTER NO. 71-88

The Honorable Roy D. Blunt
Missouri Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Secretary Blunt:

You have submitted to us a statement of purpose prepared pursuant to Section 116.334, RSMo 1986. The statement which you have submitted is as follows:

Shall Article III, Section 39(b), of the Missouri Constitution be amended to make the Lottery Commission a constitutionally created agency with specific powers; to expand the number of Lottery Commissioners from three to five; to create the "Missouri Lottery Fund for Education" from which Lottery proceeds shall be appropriated to support education; to increase the amount of Lottery proceeds for funding prizes; and to eliminate the maximum percentages of Lottery proceeds that can be used for administration and advertising; and to eliminate advertising restrictions?

See our Opinion Letter No. 69-88.

We approve the legal content and form of the proposed statement. Under the provisions of Section 116.334, the approved statement of purpose, unless altered by a court, is the petition title for the measure circulated by the petition and the ballot title if the measure is placed on the ballot.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General

FIRE PROTECTION DISTRICTS: Section 321.244, RSMo 1986,
PROPERTY TAX: relating to voter-approved
TAX RATE ROLLBACK: property tax increases for fire
protection districts, excepts fire
protection districts from the provisions of Section
137.073.5(2)(a) and (b), RSMo 1986.

July 13, 1988

OPINION NO. 74-88

The Honorable Tom McCarthy
Senator, District 26
State Capitol Building, Room 427
Jefferson City, Missouri 65101



Dear Senator McCarthy:

This opinion is in response to your question concerning rollback of the voter-approved property tax rate increases for the Eureka Fire Protection District. The question you posed is as follows:

Did the Missouri Auditor properly rollback three cents (\$.03) of the 1987 tax levy of the Eureka Fire Protection District of St. Louis and Jefferson Counties, Missouri, under Missouri Revised Statute 137.073, concerning reassessment generally, where an increase in both the general and ambulance levies of said district had been voted upon and passed by the voters of the Eureka Fire Protection District, which propositions submitted to the voters were in conformance and compliance with Missouri Revised Statute 321.244, concerning fire protection districts specifically?

Based on information we have been provided, we understand that at the election on April 7, 1987, voters of the Eureka Fire Protection District, St. Louis and Jefferson Counties, Missouri, approved the following propositions:

Proposition No. 1: Shall the Board of Directors of the Eureka Fire Protection District be authorized to increase the rate of levy for funds to provide for the support of the district from forty-four cents (\$0.44) to seventy-five cents (\$0.75) on each one hundred dollars of assessed valuation?

The Honorable Tom McCarthy

Proposition No. 2: Shall the Board of Directors of the Eureka Fire Protection District be authorized to increase the rate of levy for funds to provide for the support of emergency ambulance service of the district from eleven cents (\$0.11) to thirty cents (\$0.30) on each one hundred dollars of assessed valuation?

Substantiating documentation for the levy increases was forwarded to the Missouri State Auditor's Office for review. After reviewing the substantiating documentation, the Auditor's office determined that the fire protection district had failed to comply with the provisions of Section 137.073.5(2)(a), RSMo, and that as a result the tax rate ceiling was to be determined under the provisions of Section 137.073.5(2)(b), RSMo, resulting in the aforementioned rollback.

Chapter 137, RSMo, deals with the assessment and levy of property taxes. Section 137.073.5(2), RSMo 1986, provides in part:

(2) . . . In the year of general reassessment, the tax rate ceiling, as calculated under this section, of each political subdivision may be increased as follows:

(a) For political subdivisions in which the voters thereof approved an increase in the rate of levy which was advertised, in writing or by publication, or both, by the political subdivision as being based on assessed valuations in the year of general reassessment, the total increase in the rate of levy so approved by the voters of such political subdivision;

(b) For political subdivisions not included in paragraph (a) of this subdivision, the tax rate ceiling of such political subdivisions shall be increased by an amount which will generate the same amount of tax revenues as the increase approved by the voters of the political subdivision would have generated if such increase had been included in the rate of levy imposed in the year prior to general reassessment.

The Honorable Tom McCarthy

Section 137.073.5 was amended to include subsections (2)(a) and (b) in 1985. See Conference Committee Substitute No. 2 for Senate Committee Substitute for House Committee Substitute for House Bill No. 463, 83rd General Assembly, First Regular Session (1985 Mo. Laws at 564) and Senate Committee Substitute for Senate Bill No. 152, 83rd General Assembly, First Regular Session (1985 Mo. Laws at 526). Section 137.073.5 was amended in 1986 by Senate Committee Substitute for House Substitute for House Committee Substitute for House Bill Nos. 1022, 1032 and 1169, 83rd General Assembly, Second Regular Session, (hereinafter "House Bill No. 1022"), which was effective June 20, 1986. See 1986 Mo. Laws at 620-621.

Chapter 321, RSMo, deals with fire protection districts. Chapter 321 was amended to include Section 321.244 by House Bill No. 877, 83rd General Assembly, Second Regular Session, (hereinafter "House Bill No. 877"), which was effective April 30, 1986. See 1986 Mo. Laws at 869. Section 321.244, RSMo 1986 provides:

321.244 Reduced tax levy may be increased to maximum limits, by elections, ballot form.--1. Any fire protection district which has revised or reduced any levy which it has been authorized to impose under the provisions of section 321.225, 321.240, 321.241, 321.243, 321.610, or 321.620, under any provision of the constitution or laws of this state, may increase each such revised or reduced levy up to, but not in excess of, the maximum limits allowed under the section authorizing the rate of levy sought to be increased by submitting the following proposition to the voters of the district at any primary, general or special election:

Shall the board of directors of
the Fire
Protection District be authorized to
increase the rate of levy for
.
(Insert purpose of which tax is
levied)

from. . . . cents to
cents on each one hundred dollars of
assessed valuation?

The Honorable Tom McCarthy

_____ Yes
_____ No

2. If any of the propositions submitted under subsection 1 of this section is approved by a majority of the voters of the district voting thereon, the board of directors may increase the levy which was the subject of such proposition to the amount authorized by such proposition.

Section 137.073.5 provides general provisions for the assessment and levy of property taxes for political subdivisions. Section 321.244, however, is a special provision relating in particular to fire protection district levies. Statutes on similar subject matters are regarded as in pari materia and must be considered together, even though enacted at different times and found in different places. ITT Canteen Corporation v. Spradling, 526 S.W.2d 11, 16 (Mo. 1975).

Section 137.073.5(2)(a) and (b) is in conflict with Section 321.244 to the extent that it imposes additional requirements on fire protection districts if they are to impose the full amount of the approved levy increase. The provisions of Section 137.073.5(2)(a) require fire protection districts to advertise that proposed levy increases will be based on assessed valuations in the year of general reassessment, and if they fail to do so then the tax rate ceiling will be set under the provisions of Section 137.073.5(2)(b). Resolution of your question revolves around which of the statutory provisions, Section 137.073.5(2)(a) and (b) or Section 321.244, is to be controlling.

The repeal of a special statute by implication through the enactment of a later general statute is not generally favored unless the legislative intent is fairly shown. Edwards v. St. Louis County, 429 S.W.2d 718, 721 (Mo. banc 1968). In this case, the legislative history does not indicate that the legislature intended to repeal the specific provisions of Section 321.244 by its enactment of the provisions of Section 137.073 by House Bill No. 1022 later in the same legislative session. The provisions of Section 137.073.5(2)(a) and (b) were substantively in effect following the 1985 amendment. The 1986 revisions to Section 137.073.5(2)(a) and (b) were very¹ minor and did not affect the substance of those provisions. Where an act is amended, those provisions which remain unchanged when reenacted are deemed to be a continuation of the former law. See State v. Ward, 40 S.W.2d 1074, 1078 (Mo. 1931); Wring v. City of Jefferson, 413 S.W.2d

The Honorable Tom McCarthy

292, 300 (Mo. banc 1967). Because the substantive provisions of Section 137.073.5(2)(a) and (b) were in effect at the time that the legislature enacted House Bill No. 877, effective April 30, 1986, we conclude that the legislature in its passage of House Bill No. 877 containing the provisions of Section 321.244 intended to except fire protection districts from the provisions of Section 137.073.5(2)(a) and (b). Therefore, we conclude that Section 321.244 controls and the rollback in voter-approved levy increases required by Section 137.073.5(2)(b) does not apply to the levy increases of the Eureka Fire Protection District.

Conclusion

It is the opinion of this office that Section 321.244, RSMo 1986, relating to voter-approved property tax increases for fire protection districts, excepts fire protection districts from the provisions of Section 137.073.5(2)(a) and (b), RSMo 1986.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

¹The 1986 revisions to Section 137.073.5 were as follows:

Substituted "required to revise rates of levy by subsections 2 and 3 of this section or section 22 of article X of the Constitution of Missouri shall calculate" for "shall annually calculate" and substituted "revision" for "rollback" in the first sentence of subsec. 5(2). Substituted "In the year of general reassessment" for "for fiscal year beginning in 1985" in the fifth sentence of subsec. 5(2). Substituted "assessed valuations in the year of general reassessment" for "1985 assessed valuations" in subsec. (5)(2)(a). Substituted "the year prior to general reassessment" for "1984" at the end of subsec. (5)(2)(b).

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P O Box 899
(314) 731 3321

March 14, 1988

OPINION LETTER NO. 78-88

Charles E. Kruse
Director
Department of Agriculture
Post Office Box 630
Jefferson City, Missouri 65102

Dear Mr. Kruse:

This opinion letter is in response to your question asking:

What are the duties and scope of enforcement authority of the Missouri Department of Agriculture, pursuant to Section 414.052, RSMo 1987 Supp., with respect to the safety of premises used for storage of petroleum products?

Section 414.052, RSMo Supp. 1987, provides:

414.052. Premises utilized for sale of fuels to be safe from fire and explosion -- inspection, when. -- 1. All premises including bulk storage installations, terminals, dispensing or distributing facilities, equipment, appliances or devices utilized for the sale of products regulated by sections 414.012 to 414.152 shall be kept in such condition as to be safe from fire and explosion and not likely to cause injury to adjoining property or to the public.

2. At least every six months, the director shall inspect and examine all premises in this state at or on which gasoline, gasoline-alcohol blends, diesel

Charles E. Kruse

fuel, heating oil, kerosene and aviation turbine fuel is kept and sold at retail, provided that sales at such premises shall aggregate on an average two hundred gallons or more per month, except marine installations, which shall be tested and inspected at least once per year.

Section 414.152, RSMo Supp. 1987, provides:

414.152. Violations, penalty -- hearings, procedures. -- 1. Any person violating any of the provisions of this chapter shall be deemed guilty of a class A misdemeanor. The prosecutor of each county in which a violation occurs shall be empowered to bring an action hereunder. But if a prosecutor declines to bring such action, then the attorney general may bring an action instead, and in so doing shall have all the powers and jurisdiction of such prosecutor.

2. Any person who is found, upon investigation by the department of agriculture or by the department of revenue, to be in possible violation of any provision of this chapter, shall be notified by certified mail of the facts constituting such violation, and shall be afforded an opportunity by the appropriate director to explain such facts at an informal hearing to be conducted within one week of such notification. In the event that such person fails to timely respond to such notification or upon unsuccessful resolution of any issues relating to an alleged violation, such person may be summoned to a formal administrative hearing before a hearing officer conducted in conformance with chapter 536, RSMo, and if found to have committed one or more violations, may be ordered to cease and desist from such violation, such order to be enforceable in circuit court, and, in addition, may be required to pay a penalty of not more than fifty dollars per occurrence. Any party to such hearing aggrieved by a determination of a hearing officer may appeal to the

Charles E. Kruse

circuit court of the county in which such party resides, or if the party is the state, in Cole County, in accordance with chapter 536, RSMo.

2 CSR 90-30.050(1) provides:

All locations utilized for the sale or storage of petroleum products regulated by chapter 414, RSMo shall meet the requirements of the National Fire Protection Association (NFPA) Manual No. 30 entitled, Flammable and Combustible Liquids Code, 1987 Edition. Existing plants, storage, storage equipment, buildings, structures and installations for the storage, handling or use of flammable or combustible liquids at any location which is not in strict compliance with the terms of this code may be continued in use, provided these do not constitute a distinct hazard to life or property. When the director determines that continued use will constitute a distinct hazard to life and property s/he shall notify the owner or operator and specify reason in writing and shall order the correction, discontinuance or removal of same.

Section 414.052.1, RSMo Supp. 1987, requires that all premises upon which flammable liquids including gasoline are stored or handled be kept in a condition safe from fire or explosion and not likely to cause injury to adjoining property or to the public. Section 414.052.2, RSMo Supp. 1987, then mandates a biannual inspection of all such premises.

Section 414.152, RSMo Supp. 1987, sets forth remedies available to the state for enforcing and penalizing violations. Section 414.152.1, RSMo Supp. 1987, states that any person violating any of the provisions of Chapter 414 shall be deemed guilty of a class A misdemeanor. Section 414.152.2, RSMo Supp. 1987, sets forth a procedure for conducting departmental administrative hearings to determine violations of Chapter 414 and further authorizes the director to issue cease and desist orders and assess penalties.

This authority extends to the violation of any provision of Chapter 414. Since Section 414.052, RSMo Supp. 1987, requires all premises for storage and handling of flammable liquids to be

Charles E. Kruse

safe from fire and explosion and not likely to cause injury to adjoining property or to the public, it follows that any condition of premises to the contrary is a violation of a provision of Chapter 414 and subject to the enforcement remedies afforded by Section 414.152, RSMo Supp. 1987.

The statutory enforcement authority contained in Chapter 414 extends to the issuance of cease and desist orders and assessments of prescribed penalties upon a finding that any person is maintaining or has maintained a flammable liquid storage or handling facility in an unsafe condition so as to be at risk from fire or explosion or is likely to injure adjoining property or members of the public. The statute does not distinguish between new and old facilities or some types of violations and not others and, therefore, applies to all.

2 CSR 90-30.050(1) provides that the standard for safety of storage or handling premises shall be the requirements of the National Fire Protection Association Manual No. 30 entitled Flammable and Combustible Liquids Code. Existing plants need not be in strict compliance with the code provided the continued use of those facilities does not constitute a distinct hazard to life or property. The language of the rule differs from that of the statute in that the statute does not distinguish between fire and explosion risks which constitute a hazard to life or property and those that do not.

Since it may reasonably be surmised that any unsafe condition as to risk of fire or explosion constitutes a hazard, the difference of language between the rule and the statute cannot be interpreted to narrow the scope of safety enforcement authority or the duty to act upon safety violations. The rule relaxing strict adherence to compliance with code provisions does not confer any rights precluding inspection and enforcement authority to any owner of premises upon which a condition dangerous to the public or adjoining property exists. City of Marysville v. Standard Oil Co., 27 F.2d 478 (8th Cir. 1928), aff'd, 279 U.S. 582, 49 S.Ct. 430, 73 L.Ed. 856 (1929) following a line of cases beginning with Maleverer v. Spinke, 1 Dyer 35b, 36b, 73 Eng. Rep. 79, 81 (K.B. 1538). Deviations from the code must be deemed technical in nature and not substantive as to any safety violation under Section 414.052, RSMo Supp. 1987. In interpreting a rule or statute, courts look to the plain language comprising same and not to any extrinsic factor. Blue Springs Bowl v. Spradling, 551 S.W.2d 596 (Mo. banc 1977).

In summary, the Missouri Department of Agriculture is empowered to conduct safety inspections of premises utilized for

Charles E. Kruse

the storage and handling of flammable liquids including gasoline and upon a finding of safety violations, including conditions upon such premises involving likely injury to adjoining property or the public, may pursue administrative remedies and such authority is not limited to the type or age of the facility or the nature of the violation.

Very truly yours,

A handwritten signature in dark ink, appearing to read "William L. Webster", written in a cursive style.

WILLIAM L. WEBSTER
Attorney General

METROPOLITAN ZOOLOGICAL PARK
AND MUSEUM DISTRICT:
REASSESSMENT:
TAXATION -- PROPERTY:
TAXATION -- RATE:
TAX RATE ROLLBACK:

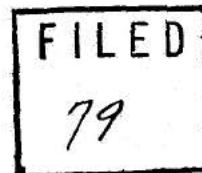
(1) The property tax rate ceiling in 1989 for the Missouri History Museum Subdistrict of the Metropolitan Zoological Park and Museum District is based on the maximum authorized property tax rate in 1988 rather than the

property tax rate actually levied in 1988, and (2) if the property tax rate levied for such subdistrict in 1989 is less than the 1989 tax rate ceiling, assuming no changes in its tax rate ceiling between 1989 and 1990, the tax rate may be raised in 1990 to the tax rate ceiling without voter approval.

March 31, 1988

OPINION NO. 79-88

The Honorable Wayne Goode
Senator, District 13
State Capitol Building, Room 329
Jefferson City, Missouri 65101



Dear Senator Goode:

This opinion is in response to your questions which can be summarized as follows:

1. If the Metropolitan Zoological Park and Museum District levies less than the maximum authorized four cent tax rate for the Missouri History Museum Subdistrict in 1988, how shall the subdistrict's 1989 tax rate ceiling, resulting from tax rate revision after reassessment, be calculated?
2. If the Metropolitan Zoological Park and Museum District levies a Missouri History Museum tax rate in 1989 of less than its 1989 tax rate ceiling, may it raise the levy up to the tax rate ceiling in 1990 without voter approval?

You have provided the following information relating to the questions you posed:

The Metropolitan Zoological Park and Museum District ("Zoo-Museum District") is empowered to levy voter-approved taxes on

The Honorable Wayne Goode

taxable property in St. Louis City and St. Louis County for the support of cultural institution subdistricts. The subdistricts, under Zoo-Museum District jurisdiction, operate or contract with the St. Louis Zoo, Art Museum, Missouri Botanical Garden, Museum of Science and Natural History and Missouri History Museum ("History Museum"). Pursuant to enabling legislation in [Section 184.353.3, RSMo 1986], the voters of St. Louis City and St. Louis County in November, 1987 established the History Museum as a new subdistrict of the Zoo-Museum [District] and authorized a tax rate for the new subdistrict not to exceed four cents per \$100 of assessed valuation of taxable property. During the campaign for the establishment of a History Museum Subdistrict, officials of the Missouri Historical Society indicated that they initially would seek only part of the maximum authorized tax rate. This remains their intention and purpose.

Sections 184.350 through 184.384, RSMo 1986, relate to the Zoo-Museum District to which you refer in your questions. Subsection 3 of Section 184.353 specifically refers to the History Museum tax rate which is the subject of your questions. Such subsection provides:

3. (1) The board of directors of any metropolitan zoological park and museum district, as established according to the provisions of sections 184.350 to 184.384, on behalf of the district may request the election officials of any city and county containing all or part of such district to submit the following described proposition to the qualified voters of such district at any general, primary or special election.
...

(2) Such proposition shall be submitted to the voters in substantially the following form at such election:

Shall the Metropolitan Zoological Park and Museum District of the City of
..... and the County of

The Honorable Wayne Goode

..... be authorized to provide for a Missouri History Museum Subdistrict and be authorized to provide the Missouri History Museum Subdistrict with a tax rate not in excess of four cents on each \$100 of assessed valuation of taxable property within the district?

YES []

NO []

(3) In the event that a majority of all the voters voting on such proposition in such city and a majority of voters voting on such proposition in such county cast "YES" votes on the proposition, then the Missouri history museum subdistrict shall be deemed established and the tax rate, as established by the board for such subdistrict, shall be deemed in full force and effect as of the first day of the second month following the election. . . .

The answers to your questions involve interpreting Chapter 137, RSMo, relating to the assessment and levy of property taxes and involve interpreting Article X, Section 22(a) of the Missouri Constitution, which section was adopted as part of what is commonly referred to as the Hancock Amendment.

Section 137.115.1(2), RSMo Supp. 1987, provides in pertinent part:

(2) Whenever changes in assessed valuation resulting from implementation of an assessment and equalization maintenance plan within the county are entered in the assessor's books, the county clerk in all counties and the assessor of St. Louis City shall notify each political subdivision . . . Each political subdivision . . . shall immediately revise the rates of levy for each purpose for which taxes are levied to the extent necessary to produce from all taxable property, exclusive of new construction and improvement, substantially the same amount of tax revenue as was produced in the previous year; . . .

(Emphasis added.)

The Honorable Wayne Goode

Section 137.115.1(2) further provides in pertinent part:

The provisions for setting and revising rates of levy under this section shall prevail in event of conflict with provisions of section 137.073 resulting from implementing an assessment and equalization maintenance plan . . . and the revised rate determined under this section shall become the tax rate ceiling as defined under section 137.073 and such rate may be increased only in the manner provided by law and the constitution. . . .

By referencing Section 137.073 in Section 137.115, the legislature manifested its intent that Section 137.115 be read in conjunction with Section 137.073 to the extent that Section 137.073 does not conflict with Section 137.115. This is significant because the definitions for both "tax revenue" and "tax rate ceiling" are found in Section 137.073.

Section 137.073.1(4), RSMo 1986, defining the term "tax rate ceiling" provides:

(4) "Tax rate ceiling", a tax rate as revised or reduced by the taxing authority to comply with the provisions of this section or when a court has determined the tax rate reduction. This is the maximum tax rate that may be levied in the year of tax rate revision or reduction and in subsequent years, unless a higher tax rate ceiling is approved by voters of the political subdivision as provided in this section.

Section 137.073.1(5), RSMo 1986, defining the term "tax revenue", provides in pertinent part:

(5) "Tax revenue", when referring to the previous year, means the actual receipts from ad valorem levies on all classes of property, including state assessed property, in the immediately preceding fiscal year of the political subdivision, plus an allowance for taxes billed but not collected in the fiscal year and plus an additional allowance for the revenue which would have been collected

The Honorable Wayne Goode

from property which was annexed by such political subdivision but which was not previously used in determining tax revenue under this section. . . . For purposes of political subdivisions which were authorized to levy a tax in the year prior to general reassessment but which did not levy such tax, the term "tax revenue", as used in relation to the reduction or revision of tax levies mandated by law for the year of general reassessment or a subsequent year, shall mean that amount which such political subdivisions would have received in their fiscal year which included or ended on December thirty-first of the year prior to general reassessment had they levied the tax they were authorized to levy in that same fiscal year.

(Emphasis added.)

In 1986, the legislature amended the above definition of tax revenue to add that provision which is highlighted above by underlining. When the legislature has altered an existing statute, such change is deemed to have an intended effect, and the legislature will not be charged with doing a meaningless act. State v. Sweeney, 701 S.W.2d 420 (Mo. banc 1985). In light of the amendment the phrase "tax revenue as was produced in the previous year," as used in both Sections 137.073 and 137.115, means the amount which would have been received in the previous year had the maximum authorized tax been levied. The legislature's amendment of the definition of "tax revenue" evidences its intent to provide political subdivisions with the flexibility to decide not to levy the maximum authorized tax without adversely affecting how the tax rate ceiling is calculated.

This conclusion is consistent with the language of the Hancock Amendment which provides for a tax rate reduction under certain circumstances. In pertinent part, that language is as follows:

[T]he maximum authorized current levy . . . shall be reduced to yield the same gross revenue from existing property . . . as could have been collected at the existing authorized levy on the prior assessed value.

The Honorable Wayne Goode

(Emphasis added.) Missouri Constitution, Article X, Section 22(a).

The legislature has evidenced its intent that the tax rate ceiling for a particular subdivision be computed based on the maximum authorized tax and not the actual tax imposed.

With respect to your second question, Section 137.073.6(3) provides:

(3) The governing body of any political subdivision except a school district may levy a tax rate lower than its tax rate ceiling and may increase that lowered tax rate to a level not exceeding the tax rate ceiling without voter approval.

Assuming the tax rate ceiling does not change between 1989 and 1990, if the property tax rate levied in 1989 is less than the 1989 tax rate ceiling, the tax rate may be raised in 1990 to the tax rate ceiling without voter approval.

Conclusion

It is the opinion of this office that (1) the property tax rate ceiling in 1989 for the Missouri History Museum Subdistrict of the Metropolitan Zoological Park and Museum District is based on the maximum authorized property tax rate in 1988 rather than the property tax rate actually levied in 1988, and (2) if the property tax rate levied for such subdistrict in 1989 is less than the 1989 tax rate ceiling, assuming no changes in its tax rate ceiling between 1989 and 1990, the tax rate may be raised in 1990 to the tax rate ceiling without voter approval.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

June 7, 1988

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

OPINION LETTER NO. 80-88

Mr. Carl M. Koupal, Jr.
Director
Department of Economic Development
301 West High Street
Jefferson City, Missouri 65101

Dear Mr. Koupal:

This opinion letter is in response to your question asking:

Can an irrevocable, unconditional guarantee by a Business Firm of a bank loan, the proceeds of which are utilized by a Neighborhood Organization (as defined in 32.105(7) RSMo) qualifying for Neighborhood Assistance, constitute Financial Assistance?

Until now, "Financial Assistance" has been limited to outright cash contributions, or forfeited interest on certain loans to Neighborhood Assistance projects.

Based on the information you have provided, it is our understanding that the Center of Contemporary Arts (COCA), an organization qualified as a "Neighborhood Organization" pursuant to Section 32.105(7), RSMo 1986, of the Neighborhood Assistance Act, is currently indebted to Mark Twain National Bank in the amount of \$150,000. The remaining term of the loan is five years with loan payments due every six months. Pursuant to a proposed three-way agreement between COCA, the Mark Twain National Bank, and four or five individuals, the obligation to repay the debt is to be delegated to the individuals conditioned upon them qualifying for the state tax credit available under the Missouri Neighborhood Assistance Act, Sections 32.100 to 32.125, RSMo 1986.

Mr. Carl M. Koupal, Jr.

The proposed agreement is to be structured as a "novation" of the original loan. That is, the original loan contract is to be extinguished and the original debtor completely released from all future liability with regard to repayment of the loan. A new loan contract is executed with the new debtor who is exclusively responsible for repayment.

In our opinion, the execution of such a novation contract by an individual qualifying as a "business firm," as that term is defined in Section 32.105(1), RSMo 1986, would qualify that individual for the state tax credit available under the Missouri Neighborhood Assistance Act if approved by the Director of the Division of Community Development of the Department of Economic Development. Section 32.110, RSMo 1986, provides that any business firm engaging in the activities of providing neighborhood assistance shall receive a tax credit as provided in Section 32.115 if the Director of the Division of Community Development annually approves the proposal of the business firm and the proposal has been endorsed by the local government as one in keeping with the overall community or neighborhood development plan. Tax credits may also be allowed if the Director of the Division of Community Development determines that investments by a business firm for neighborhood assistance can be accomplished through contributions to a neighborhood organization.

"Neighborhood assistance" is defined in Section 32.105(6), RSMo 1986, as "furnishing financial assistance, labor, material, or technical advice to aid in the physical improvement or rehabilitation of any part or all of a neighborhood area." There is nothing in this definition or any other section of the Neighborhood Assistance Act which would restrict the term "financial assistance" to the direct contribution of cash or the waiver of interest due on a loan to a neighborhood organization. An agreement by which a neighborhood organization is released from all future liability with regard to repayment of a loan certainly qualifies as "financial assistance" to that neighborhood organization.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-0021

October 13, 1988

OPINION LETTER NO. 83-88

The Honorable Danny Staples
Senator, District 20
State Capitol Building, Room 418
Jefferson City, Missouri 65101

Dear Senator Staples:

This opinion letter is in response to your question asking:

If a county does not provide for the pensioning of its officers and employees under the Missouri Local Government Employees' Retirement System, may a county health center established pursuant to Chapter 205, RSMo 1986, provide for the pensioning of its officers and employees under the Missouri Local Government Employees' Retirement System?

This office addressed a similar question in Opinion No. 225, Banta, 1974, a copy of which is enclosed. In that opinion, this office concluded a county health center established pursuant to Chapter 205, RSMo 1969, was not a political subdivision as defined in Section 70.600(19), RSMo Supp. 1973, but was a part of the county government. You request that we reexamine that opinion in light of the statutory changes that have occurred since the date of that opinion.

Sections 70.600 through 70.755, RSMo, provide for the Missouri Local Government Employees' Retirement System. Section 70.610, RSMo 1986, provides, "[e]ach political subdivision, by a majority vote of its governing body, may elect to become an employer and cover its employees under the system. . . ." Section 70.600(19) as enacted by Senate Committee Substitute for House Bill No. 1098, 84th General Assembly, Second Regular Session (1988), defines "political subdivision" as follows:

The Honorable Danny Staples

(19) "Political subdivision", any governmental subdivision of this state created pursuant to the laws of this state, and having the power to tax, except public school districts; a board of utilities of any constitutional charter city which is required by charter to establish the compensation of employees of the utility separate from the compensation of other employees of the city may be considered a political subdivision for purposes of sections 70.600 to 70.755;

Sections 205.010, RSMo 1986 et seq. provide for county health centers. In your opinion request, you point out that the statutes have been revised since the date of our prior opinion so that a county health center now has its own treasurer rather than the county health center funds being required to be held in the county treasury. This change in Section 205.042 occurred in 1982. See Laws of Missouri, 1982, page 374. This change does not result in a county health center being a separate political subdivision rather than continuing to be a part of the county. See Attorney General Opinion Letter No. 182-87, a copy of which is enclosed, wherein this office concluded a county hospital, even though the statutes had been revised to provide for the office of treasurer of the county hospital board of trustees, had no power to borrow money on a short term basis from a financial institution. We have also reviewed the other statutory changes that have occurred since the date of Opinion No. 225, Banta, 1974. Despite the statutory changes, we believe the conclusion and reasoning of our prior opinion is still applicable.

It is the opinion of this office that a county health center is not a separate political subdivision as defined in Section 70.600(19) as enacted by Senate Committee Substitute for House Bill No. 1098, 84th General Assembly, Second Regular Session (1988) and may not provide for the pensioning of its officers and employees under the Missouri Local Government Employees' Retirement System when the county has not so provided.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

DEPARTMENT OF PUBLIC SAFETY: Pursuant to Section 320.230.2,
FIRE MARSHAL: RSMo 1986, the fire marshal, his
assistants and investigators who
have completed 240 hours of basic police training are peace
officers with general police powers when investigating
fire-related offenses. They are also considered peace officers
when assaulted while engaged in the performance of their duties.

May 31, 1988

OPINION NO. 85-88

Richard C. Rice
Director
Department of Public Safety
Post Office Box 749
Jefferson City, Missouri 65102

Dear Mr. Rice:

This opinion is in response to your questions asking:

Do the fire marshal and his assistants have full police authority in conducting investigations of fires and possible arson related offenses under RSMo. 320.230?

Does the language in RSMo. 320.230 to the effect the fire marshal and his investigators "shall be deemed peace officers if they shall be assaulted" mean that this is the only situation in which they shall be deemed peace officers?

Section 320.230.2, RSMo 1986, which generally sets forth the authority of the fire marshal and his assistants states:

The state fire marshal and his paid investigators who have completed at least two hundred forty hours of basic police training as approved by the director of the department of public safety shall have the power of arrest for fire related offenses only, and only when investigating the cause, origin, or circumstances of fires, explosions, or like occurrences involving the possibility of arson, or related offenses, and in connection with such offenses when aiding and assisting the

Richard C. Rice

sheriff of any county or the chief of police of any municipality, or their designated representatives, at their request and while engaged in the performance of their duties as herein prescribed shall be deemed peace officers if they shall be assaulted.

In interpreting the statute, the fundamental rule is to ascertain the intent of the General Assembly from the language used and to give effect to that intent. Brown Group, Inc. v. Administrative Hearing Commission, 649 S.W.2d 874, 881 (Mo.banc 1983). The plain meaning of the statutory language should also be given effect whenever possible. State ex rel. D.M. v. Hoester, 681 S.W.2d 449, 450 (Mo.banc 1984).

With these principles in mind, the answer to your first question about the authority of the fire marshal's office can be determined by reviewing the statutory authority of the fire marshal as a whole. Section 320.240, RSMo 1986, allows the fire marshal's office to enter property at all reasonable hours to make investigations of a fire loss or the origin of a fire. Section 320.245, RSMo 1986, gives the fire marshal the authority to subpoena documents, records and witnesses as part of an investigation. Section 320.230.1, RSMo 1986, states that the fire marshal shall conduct investigations and may conduct hearings into the "cause, origin or circumstances of fire losses." Finally, as previously set forth, Section 320.230.2, RSMo 1986, gives the fire marshal's office arrest authority. That arrest authority is limited, however, to fire-related offenses.

In reading these statutes, all of which relate to the same subject, they are to be harmonized so as to accomplish the intent of the legislation. State ex rel. Day v. County Court of Platte County, 442 S.W.2d 178, 182 (Mo.App. 1969). Reading these statutes together leads to the conclusion that the fire marshal and his assistants do have full police powers when investigating fires and fire-related offenses. In other words, the subject matter jurisdiction of the fire marshal's office is limited, but full police authority exists within that subject matter jurisdiction.

This interpretation helps to answer your second question concerning whether the fire marshal and his assistants shall be deemed peace officers "if they shall be assaulted." As already stated, the fire marshal and his assistants have police authority, with limited subject matter jurisdiction. This subsection does not state that the fire marshal and his assistants are peace officers only when assaulted, but simply

Richard C. Rice

states that they will be considered police officers when assaulted. We are confined to the plain meaning of the language employed in the statute. State ex rel. DeGraffenreid v. Keet, 619 S.W.2d 873, 876 (Mo.App. 1981). There are a number of crimes involving assaults where the status of the victim as a peace officer is relevant. See Section 575.150 (resisting or interfering with arrest); Section 565.032.2(5) (first degree murder). The language of Section 320.230, RSMo 1986, seems intended only to specify that members of the fire marshal's office are peace officers under such provisions and was not intended to suggest that they are peace officers only when assaulted.

CONCLUSION

It is the opinion of this office that pursuant to Section 320.230.2, RSMo 1986, the fire marshal, his assistants and investigators who have completed 240 hours of basic police training are peace officers with general police powers when investigating fire-related offenses. They are also considered peace officers when assaulted while engaged in the performance of their duties.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

CITY ELECTIONS:
COUNTY ELECTIONS:
ELECTION COMMISSIONERS,
BOARD OF:
ELECTION EXPENSE
AND EXPENDITURES:
ELECTIONS:

The Clay County Board of Election Commissioners has the authority to enter into a contract for the service and maintenance of voting machines and has the authority to enter into a contract to upgrade its computer equipment, the Board

need not comply with any purchasing procedures applicable to county purchases or to city purchases, and both the city and county are liable for their proportionate share of the costs as provided in Section 115.073.1, RSMo 1986.

March 21, 1988

OPINION NO. 87-88

The Honorable Bonnie Sue Cooper
Representative, District 32
State Capitol Building, Room 203C
Jefferson City, Missouri 65101

Dear Representative Cooper:

This opinion is in response to your question asking:

Does the Clay County Board of Election Commissioners have authority to enter into contracts they deem necessary for the registration of voters and the conduct of elections (§115.043 R.S.Mo.) which obligate payment of funds from the general revenue of the City of Kansas City and the general revenue of Clay County (§§115.073 and 115.075 R.S.Mo.)?

Your opinion request indicates you are concerned about two situations. You state those situations as follows:

1. The Clay County Board of Election Commissioners desires to enter into a contract for the service and maintenance of voting machines, which has not been done for approximately ten years. The Clay County Budget Officer suggests that only he can enter into contracts.
2. The Clay County Commission is insisting that the [voter registration] records

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presently maintained on Board computers be transferred to a new county computer system. The Board refuses to do so and desires to enter into a contract to upgrade present computer equipment.

Pursuant to Sections 115.015 and 115.017(4), RSMo 1986, the Clay County Board of Election Commissioners (the Board) is an "election authority" as that term is used throughout Chapter 115, RSMo. As the "election authority", the Board has the authority to "make all rules and regulations, not inconsistent with statutory provisions, necessary for the registration of voters and the conduct of elections." Section 115.043, RSMo 1986.

Specifically in regard to the voting machines at issue in the first fact situation, the Board is given broad responsibilities for the proper operation of those machines. Section 115.267, RSMo 1986, provides:

115.267. Experimental use, adoption of or abandonment of automated voting equipment authorized. -- Any election authority may adopt, experiment with or abandon any voting machine meeting the requirements of this subchapter or any electronic voting system approved for use in the state, or may lease one or more voting machines or other equipment, either with or without option to purchase, and may use any authorized voting equipment at any polling place in its jurisdiction.

The Board as "election authority" also provides all ballots for the machines (Section 115.247, RSMo 1986) and "shall cause the voting machines to be put in order, set, adjusted and made ready for voting before they are delivered to polling places . . . [and] shall have all recording counters, except the protective counter on each voting machine set at zero (000)." Section 115.257.1, RSMo 1986. The Board has the responsibility to have the automatic tabulating equipment and marking devices tested and ready for operation at each election. Sections 115.233 and 115.235, RSMo 1986. The Board may also provide for demonstrations and instructions on the proper use of the voting machines (Section 115.269, RSMo 1986) and provide for their use by other persons and organizations when not being used by the Board (Section 115.271, RSMo 1986).

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Section 115.073.1, RSMo 1986, provides:

1. In any county containing a portion but not the major portion of a city which has over three hundred thousand inhabitants, all general expenses related to the conduct of elections and the registration of voters shall be paid proportionally from the general revenue of the city and the general revenue of the county. The city shall pay such proportion as its population within the county is to the total population of the county as determined by the last preceding federal decennial census.

(Emphasis added.)

At a minimum, Sections 115.043, 115.267, 115.257, 115.233 and 115.235, give the Board, as an election authority, the authority to purchase, service and maintain voting machines as well as the marking devices and automatic tabulation equipment. Section 115.267 explicitly gives the Board the authority to purchase and lease voting machines. See State ex rel. Cole v. Matthews, 274 S.W.2d 286 (Mo. banc 1954) interpreting similar provisions in Chapter 121, RSMo Cum.Supp. 1953. Implied authority to provide for service and maintenance is derived as a necessary implication from the other cited provisions. This would logically include matters pertaining to keeping the voting machines and related equipment in working order.

"It is elementary that what is implied in a statute is as much a part of it as what is expressed It is also elementary that, when a power is conferred by statute, everything necessary to carry out the power and make it effectual and complete will be implied." "The rule for interpreting statutes, that a power given carries with it, incidentally or by implication, powers not expressed, but necessary to render effective the one that is expressed," [Citations omitted.] State ex rel. Ferguson v. Donnell, 349 Mo. 975, 163 S.W.2d 940, 943-944 (banc 1942).

The entire Comprehensive Election Act of 1977 discloses a clear legislative intent that complete supervision and control

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of registration and balloting be vested in the Board of Election Commissioners and it necessarily follows that no construction of the statutes relating to the conduct of such elections must be indulged which might serve to limit or unduly restrict the discharge of those duties enjoined upon the Board.

That the voting equipment be kept in good working order is necessary to the voting process. The cost of service and maintenance, then, is properly considered as one of the "general expenses related to the conduct of elections . . ." in Section 115.073.1, which makes it the responsibility of the City of Kansas City and Clay County to pay for such servicing and maintenance.

The legislature has not provided any requirement that the Board of Election Commissioners be subject to the provisions of Section 50.660 of the County Budget Law or to any other county or city procedure involving purchasing. When enacting the Comprehensive Election Act of 1977, the legislature made explicit such requirements when it wanted them applicable. See, for example, Section 115.049.3 (Laws 1977, p. 207 Section 2.080) regarding the authority of the legislative body responsible for payment to approve or disapprove an increase in the number of Board employees or the total yearly amount of all salaries paid to Board employees, and Section 115.053.4 (Laws 1977, p. 207 Section 2.090) wherein the same legislative body must approve the amounts paid to deputies. The legislature has always been explicit when it wanted to involve the city or county in regard to Board expenditures.

This is consistent with past versions of the election laws in which the legislature made explicit its intent to subject a Board of Election Commissioners to the County Budget Law. For instance, Section 113.110, RSMo 1949, provided in part:

"Said board of election commissioners is hereby authorized to provide, subject to the provisions of section 50.660, all necessary ballot boxes, registration books, verification lists,"

See State ex rel. Cole v. Matthews, *supra*, holding that, even under that statute, a Board of Election Commissioners still retained the discretionary authority to designate the type and number of voting machines with the county having only a ministerial duty of effecting the purchase of the machines. Section 113.110 was repealed by the Comprehensive Election Act of 1977. Since the legislature, when enacting that Act, kept that part of the scheme of the former law requiring cities and

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counties to pay registration and election costs, but did not retain the requirement, in regard to the types of costs which are the subject of this opinion, to have Section 50.660 applicable, it must be concluded that the legislature intended to change the law in regard to the applicability of that section.

A statute as amended should be construed on the theory that the legislature intended to accomplish something by the amendment. ... The legislature is not presumed to have intended a useless act ... and the legislature's action of repeal and enactment is presumed to have some substantive effect such that it will not be found to be a meaningless act of housekeeping. [Citations omitted.] City of Willow Springs v. Missouri State Librarian, 596 S.W.2d 441, 444-445 (Mo. banc 1980).

Therefore, with respect to the first situation about which you are concerned, we conclude the Clay County Board of Election Commissioners has the authority to enter into a contract for the service and maintenance of voting machines, the Board need not comply with any purchasing procedures applicable to county purchases or to city purchases, and both the city and county are liable for their proportionate share of the cost.

We think that the same conclusion is called for in regard to the second situation concerning the upgrading of the Board's computer system. The law gives the Board a comprehensive set of responsibilities regarding the registration of voters and the maintenance of information concerning registrations. Section 115.043, RSMo 1986, provides:

115.043. Rules and regulations, powers of election authorities --Each election authority may make all rules and regulations, not inconsistent with statutory provisions, necessary for the registration of voters and the conduct of elections.

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Section 115.141, RSMo 1986, provides:

115.141. Registration to be supervised by election authority. -- Each election authority shall supervise the registration of voters within its jurisdiction in accordance with this subchapter and shall direct the activities of all deputy registration officials.

The Board must also keep the registration information current and accurate through canvassing and other means. Sections 115.179 to 115.223, RSMo 1986. To facilitate its fulfillment of these responsibilities, the Board has been authorized by the General Assembly to use computer technology:

The election authority may place all information on any registration cards in computerized form. . . . [Section 115.157, RSMo 1986.]

Since the law has vested in the Board broad responsibilities regarding the collection and accuracy of registration data, it stands to reason that the discretion to choose the means by which the Board will fulfill its responsibilities lies with the Board. Again the City of Kansas City and Clay County are responsible for the costs of maintaining these record systems as "general expenses related to the conduct of elections and the registration of voters . . .". Section 115.073.1, RSMo 1986.

Although the Board has discretion when contracting for the purchase of services, the Board has a fiduciary duty to seek the best bid possible when contracting for services. Competitive bidding customarily enables a government entity to obtain the best price possible. For those services where competitive bidding is feasible, this office encourages the Board to solicit bids or proposals to ensure that the services are obtained at the best price possible.

Conclusion

It is the opinion of this office that the Clay County Board of Election Commissioners has the authority to enter into a contract for the service and maintenance of voting machines and

The Honorable Bonnie Sue Cooper

has the authority to enter into a contract to upgrade its computer equipment, the Board need not comply with any purchasing procedures applicable to county purchases or to city purchases, and both the city and county are liable for their proportionate share of the costs as provided in Section 115.073.1, RSMo 1986.

Very truly yours,

A handwritten signature in black ink, appearing to read "William L. Webster", with a long horizontal flourish extending to the right.

WILLIAM L. WEBSTER
Attorney General

ABANDONMENT OF PROPERTY:
CONSTITUTION:
ESCHEATS:
UNCLAIMED PROPERTY:
UNIFORM DISPOSITION OF
UNCLAIMED PROPERTY ACT:

The disposition of abandoned property delivered to the state pursuant to Missouri's Uniform Disposition of Unclaimed Property Act, Sections 447.500 through 447.585, RSMo 1986, is governed by the provisions of

that Act, and is not subject to the provisions of Article IX, Section 5 of the Missouri Constitution.

April 26, 1988

OPINION NO. 89-88

Carl M. Koupal, Jr.
Director
Department of Economic Development
Post Office Box 1157
Jefferson City, Missouri 65102

Dear Mr. Koupal:

This opinion is in response to your question asking:

Does Article 9, Section 5 of the Missouri Constitution govern the disposition of all abandoned property delivered to the State of Missouri pursuant to Chapter 447 RSMo Uniform Disposition of Unclaimed Property?

Missouri's Uniform Disposition of Unclaimed Property Act, Sections 447.500 through 447.585, RSMo 1986 ("the Act"), which became effective August 13, 1984, is a substantial replication of the major provisions of the Uniform Disposition of Unclaimed Property Act (1966 revision), 8A U.L.A. 135, promulgated by the National Conference of Commissioners on Uniform State Laws. It establishes a scheme whereby persons holding unclaimed property belonging to another are required to deliver such property to the state, which becomes the custodian thereof in perpetuity, subject to the right of the owner at any time thereafter to present his claim to the state and recover his property. The provisions of the Act are administered by the director of the Department of Economic Development ("the director").

Specific provisions in the Act require that abandoned moneys be paid to the state treasurer and all other abandoned property be delivered to the director. Section 447.543.1. All abandoned property delivered to the director is to be sold by him within one year after such delivery. Section 447.558.1.

Carl M. Koupal, Jr.

The proceeds from the sale of abandoned property are to be delivered to the state treasurer for deposit in the abandoned funds account. Section 447.558.4.

Subsection 2 of Section 447.543 provides in relevant part as follows:

The treasurer shall . . . cause such funds to be deposited in the special account known as the "Abandoned Fund Account", which is hereby created. The abandoned fund account created by this section shall be the successor account to the abandoned fund account previously in the state treasury and all funds in such accounts on August 13, 1984, shall be transferred to the abandoned fund account created by this section. . . . From this account the treasurer shall make prompt payment of claims duly allowed by the director as hereinafter provided. At any time when the balance of the account exceeds fifty thousand dollars, the treasurer may, and at least once every fiscal year shall, transfer to the general revenue of the state of Missouri the balance of the abandoned fund account which shall exceed fifty thousand dollars. Should any claims be allowed or refunds ordered which reduce the balance to less than twenty-five thousand dollars, the treasurer shall transfer from the general funds of the state an amount which is sufficient to restore the balance to fifty thousand dollars.

Article IX, Section 5, Constitution of Missouri, provides in relevant part as follows:

[T]he net proceeds of all sales of lands and other property and effects that may accrue to the state by escheat, shall be paid into the state treasury, and securely invested under the supervision of the state board of education, and sacredly preserved as a public school fund the annual income of which shall be faithfully appropriated for establishing and maintaining free

Carl M. Koupal, Jr.

public schools, and for no other uses or purposes whatsoever. [Emphasis added.]

Thus, it appears that the essence of your inquiry is whether abandoned money and other property delivered to the state pursuant to the requirements of the Act accrue to the state "by escheat" within the meaning of Article IX, Section 5 of the Constitution.

"[Escheat is] a procedure with ancient origins whereby a sovereign may acquire title to abandoned property if after a number of years no rightful owner appears." State of Texas v. State of New Jersey, 379 U.S. 674, 85 S.Ct. 626, 627[1], 13 L.Ed.2d 596 (1965). When the state takes property by escheat, its position is like that of an ultimate distributee, in default of other statutory distributees. Jacobs v. Leggett, 295 S.W.2d 825, 830[4] (Mo.banc 1956). Title to the escheated property vests in the state. State ex inf. Kell v. Buchanan, 210 S.W.2d 359, 362[4] (Mo. 1948); Section 470.230, RSMo 1986. Property may escheat to the state under the circumstances described in the general escheat statutes, Sections 470.010 through 470.260, RSMo 1986, and under other specific statutes as, for example, Sections 470.270 through 470.350, 474.010, 475.325, 456.640 through 456.650, 630.320, and 141.580, RSMo 1986.

It is our opinion that abandoned money and other property does not accrue to the state "by escheat" when it is delivered to the state pursuant to Sections 447.500 through 447.585. The Prefatory Note to the Uniform Disposition of Unclaimed Property Act, 8A U.L.A. 135, 136-137, contains the following pertinent comments:

The Uniform Act is custodial in nature--that is to say, it does not result in the loss of the owner's property rights. The state takes custody and remains the custodian in perpetuity. Although the actual possibility of his presenting a claim in the distant future is not great, the owner retains his right of presenting his claim at any time, no matter how remote. State records will have to be kept on a permanent basis. In this respect the measure differs from the escheat type of statute, pursuant to which the right of the owner is foreclosed and the title to the property passes to the state. Not only does the custodial type of statute more

Carl M. Koupal, Jr.

adequately preserve the owner's interests, but, in addition, it makes possible a substantial simplification of procedure.

The foregoing explanation of the Uniform Act has received universal affirmation by the courts in the adopting states. See Bank of America National Trust and Savings Association v. Cory, 210 Cal.Rptr. 351, 355[1] (Cal.App. 1985):

The California UPL is not a true escheat statute; rather, it has dual objectives: (1) to reunite owners with unclaimed funds or property, and (2) to give the state, rather than the holder, the benefit of the use of unclaimed funds or property. . . . The state, through the Controller, acts as the protector of the rights of the true owner.

State ex rel. Marsh v. Nebraska State Board of Agriculture, 350 N.W.2d 535, 539[3] (Neb. 1984):

[T]he uniform act is distinct from escheat laws and the State acquires no greater property right than the owner. The State may assert the rights of the owners, but it has only a custodial interest in property delivered to it under the act.

State ex rel. Baker v. Intermountain Farmers Association, 668 P.2d 503, 505 (Utah 1983):

Instead of providing for escheat (transfer of ownership) of property to the State, which requires cumbersome procedures and raises constitutional doubts, the Unclaimed Property Act "is custodial in nature." . . . When funds or property have been held long enough to be presumed abandoned, their holder reports them and then pays them over to the State, which "takes custody and remains the custodian in perpetuity."

South Carolina Tax Commission v. York Electric Cooperative, Inc., 270 S.E.2d 626, 628 (S.C. 1980):

The primary purpose of the present Uniform Act is not to raise revenue, but

Carl M. Koupal, Jr.

has been correctly described as custodial in nature. It does not result in the loss of the owner's rights in the property. The State simply takes custody of the unclaimed property and remains the custodian in perpetuity, keeping records on a permanent basis because of the fact that the owner retains the right to present his claim to the property at any time, no matter how remote. It is, therefore, not an escheat type of statute, under which the right of the owner is foreclosed and title passes to the State.

United States v. State of Alabama, 434 F.Supp. 64, 67[2] (M.D.Ala. 1977):

[T]he Alabama Uniform Disposition of Unclaimed Property Act provides a simplified method whereby the state may take possession of abandoned property, holding it until the rightful owner claims it. As the drafters of the Alabama act note, the Uniform Disposition of Unclaimed Property Act is not an escheat statute. Rather, the state merely becomes the custodian of the property in the unlikely event that the owner should eventually claim it.

Boswell v. Citronelle-Mobile Gathering, Inc., 294 So.2d 428, 432[5] (Ala. 1974):

[The appellee] argues that the Uniform Disposition of Unclaimed Property Act is an escheat act, and since an escheat act works a forfeiture, it is to be strictly construed. We do not agree with counsel's premise that the Act constitutes an escheat Act.

State ex rel. Mallicoat v. Coe, 460 P.2d 357, 358[1] (Ore. 1969):

[The Uniform Act] provides that all private and public holders of property that is presumed abandoned, as defined in the several sections of the statute, shall deliver the same to [the state] for safekeeping and for

Carl M. Koupal, Jr.


ultimate delivery to the owner of the property should he ever appear. It is not an escheat statute.

Friar v. Vanguard Holding Corp., 509 N.Y.S. 374, 376 (App.Div. 1986); and People ex rel. Callahan v. Marshall Field & Company, 404 N.E.2d 368, 371 (Ill.App. 1980).

CONCLUSION

It is the opinion of this office that the disposition of abandoned property delivered to the state pursuant to Missouri's Uniform Disposition of Unclaimed Property Act, Sections 447.500 through 447.585, RSMo 1986, is governed by the provisions of that Act, and is not subject to the provisions of Article IX, Section 5 of the Missouri Constitution.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

July 13, 1988

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 731-3321

OPINION LETTER NO. 91-88

The Honorable Robert T. Johnson
Senator, District 8
1000 Northeast Remington
Lee's Summit, Missouri 64063

Dear Senator Johnson:

This opinion letter is in response to your questions asking:

May the School District of the City of Independence under Section 162.491, RSMo, nominate candidates for the Board of Directors by some method other than petitions signed by voters, and, if so;

A. What other method or methods may be used to nominate directors, and

B. Does the Board of Education have the ability to set up and enforce its own rules and guidelines governing nomination of directors?

If it is determined that the School District of the City of Independence must follow the petition method of nominating directors, may the number of voters signatures be reduced from that amount set out in the statutes and still be sufficient to nominate directors?

Section 162.491, RSMo Supp. 1987, provides:

162.491 Directors may be nominated by petition, when--contents of petition, certain districts.--1. Directors for urban school districts, other than those districts containing the greater part of a city of

The Honorable Robert T. Johnson

over one hundred thirty thousand inhabitants, may be nominated by petition to be filed with the secretary of the board and signed by a number of voters in the district equal to ten percent of the total number of votes cast for the director receiving the highest number of votes cast at the next preceding biennial election.

2. This section shall not be construed as providing the sole method of nominating candidates for the office of school director in urban districts which do not contain the greater part of a city of over three hundred thousand inhabitants.

3. A director of any urban school district containing a city of greater than one hundred thirty thousand inhabitants and less than three hundred thousand inhabitants may be nominated as an independent candidate by filing with the secretary of the board a petition signed by five hundred registered voters of such school district.

Based on information you have provided, we understand the School District of the City of Independence is an urban school district and that the population of the City of Independence is such that subsections 1 and 2 of Section 162.491 apply to the school district. Subsection 1 of Section 162.491 provides for the petition method of nomination of directors for such an urban school district. Subsection 2 states that the method provided in subsection 1 is not the sole method of nominating candidates for the school board in such an urban district. However, as stated in your opinion request, the statutes do not specify other acceptable methods of nominating candidates.

It is the opinion of this office that such an urban school district is not limited to using the petition method specified in subsection 1 for nominating directors to the school board. If the school district were so limited, subsection 2 would have no meaning and would be a nullity. In statutory construction, it is presumed that the legislature intended every part of a statute to have effect and to be operative, and did not intend any part of a statute to be without meaning or effect. The legislature is not presumed to have intended a useless act. Stiffelman v. Abrams, 655 S.W.2d 522, 531 (Mo. banc 1983); Graves v. Little Tarkio Drainage Dist. No. 1, 134 S.W.2d 70, 78 (Mo. 1939).

The Honorable Robert T. Johnson

Section 171.011, RSMo 1986, regarding the authority of school boards to make rules and regulations, states:

171.011 School board may adopt rules and regulations.--The school board of each school district in the state may make all needful rules and regulations for the organization, grading and government in the school district. The rules shall take effect when a copy of the rules, duly signed by order of the board, is deposited with the district clerk. The district clerk shall transmit forthwith a copy of the rules to the teachers employed in the schools. The rules may be amended or repealed in like manner.

Any reasonable method which such an urban school district chooses to establish pursuant to rule or regulation for the nomination of candidates to the position of school board director is statutorily authorized by subsection 2 of Section 162.491, so long as that method is not otherwise legally improper or unconstitutional. Included among the permissible methods for nomination would be: (a) a petition method similar to that provided in subsection 1 of Section 162.491 with the number of required signatures being a lesser number, or (b) a system of filing with the Board of Education without any petition being required.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

MILITARY LEAVE: An agency, in calculating the amount
MISSOURI NATIONAL GUARD: of military leave to which a state
NATIONAL GUARD: employee is entitled, pursuant to
Section 105.270.1, RSMo 1986, should
include all days from the time of the employee's departure until
the time of his or her return, regardless of whether or not the
employee was scheduled to work on all interim days or not, for a
total of fifteen calendar days.

June 16, 1988

OPINION NO. 92-88

Richard C. Rice
Director
Department of Public Safety
Post Office Box 744
Jefferson City, Missouri 65102

Dear Mr. Rice:

This opinion is in response to your question asking:

Does section 105.270, RSMo 1986,
pertaining to paid military leaves of
absence for members of the National Guard
and Reserve who are state, county, municipi-
pal, and other public employees for up to
15 calendar days per federal fiscal year,
require or allow that they be charged
military leave under the 15 day entitlement
(1) for each day of duty performed in the
service of the United States under compe-
tent orders, regardless of holidays and
other regular days off, if any of the
military duty for the period concerned
involves one or more regular working days,
and/or (2) for each day of duty performed
in the service of the United States under
competent orders only on the regular
working days of the employee concerned,
notwithstanding the actual number of days
inclusive in the military orders.

Section 105.270, RSMo 1986, states:

1. All officers and employees of this
state, or of any department or agency
thereof, or of any county, municipality,

Richard C. Rice

school district, or other political subdivision, and all other public employees of this state who are or may become members of the national guard or of any reserve component of the armed forces of the United States, shall be entitled to leave of absence from their respective duties, without loss of time, pay, regular leave, impairment of efficiency rating, or of any other rights or benefits, to which otherwise entitled, for all periods of military services during which they are engaged in the performance of duty or training in the service of this state at the call of the governor and as ordered by the adjutant general without regard to length of time, and for all periods of military services during which they are engaged in the performance of duty in the service of the United States under competent orders for a period not to exceed a total of fifteen calendar days in any federal fiscal year.

Under 32 U.S.C. §502(a)(2) all members of the National Guard are required to "[p]articipate in training at encampments, maneuvers, outdoor target practice, or other exercises, at least 15 days each year." Congress protects those who fulfill this obligation from any loss of benefits or advantages of employment under 38 U.S.C. §202(b)(3). The purpose of this legislation was "to prevent reservists and National Guardsmen not on active duty who must attend weekend drills or summer training from being discriminated against in employment because of their Reserve membership. . . ." Monroe v. Standard Oil Co., 452 U.S. 549, 558, 101 S.Ct. 2510, 2515, 69 L.Ed.2d 226 (1981), quoting S.Rep. Mo. 1477, 90th Cong, 2d Sess. 1-2 (1968). In Monroe v. Standard Oil Co., the United States Supreme Court held, however, that Congress did not intend to require employers to provide special benefits to employee-reservists not generally made available to other employees. Id., 452 U.S. at 562, 101 S.Ct. at 2518. Thus, employers are not required to make special accommodations to employees to allow them to make up overtime or to alter the scheduled days off. Id., 452 U.S. at 564, 101 S.Ct. at 2519.

In Missouri, the predecessor to Section 105.270 stated specifically that a state employee's military leave of absence was not to exceed ten working days in any one calendar year. Section 105.270, RSMo 1969. That language specifically limiting

Richard C. Rice

leave to ten working days was changed in 1975 by the 78th General Assembly under House Bill No. 103 which amended the statute to reflect the allowance of fifteen calendar days per year. Apparently some confusion existed among employers whether ten working days meant days the employee could have worked or days the employee was scheduled to work. Recognizing this confusion, and remembering that federal law merely requires a reserve member to work fifteen days per year, it is reasonable to interpret this change to merely provide a uniform system for counting the days of leave. The change was not intended to increase the leave days available. The legislature substituted calendar days for working days specifically to show each and every day should be counted, not merely those days when a employee is scheduled to work. This is consistent with federal court interpretations of federal law who hold that employers need not make "special accommodations" for reservists. Rumsey v. New York State Department of Correctional Services, 569 F.Supp. 358, 361 (N.D.N.Y. 1983). Requiring an employer to provide a reservist fifteen working days off - days when the employee was actually scheduled to work - would be a "special accommodation" beyond which federal law required, beyond the express language of Section 105.270 and, most important, beyond the intent of the legislature as evidenced by its changing the period from ten working days to fifteen calendar days. The legislature will not presumed to have done a meaningless act. State vs. Swoboda, 658 S.W.2d 24, 26 (Mo. banc 1983).

Conclusion

It is the opinion of this office that an agency, in calculating the amount of military leave to which a state employee is entitled, pursuant to Section 105.270.1, RSMo 1986, should include all days from the time of the employee's departure until the time of his or her return, regardless of whether or not the employee was scheduled to work on all interim days or not, for a total of fifteen calendar days.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P.O. Box 899
(314) 751-3321

March 14, 1988

OPINION LETTER NO. 93-88

The Honorable Michael P. David
Representative, District 63
State Capitol Building, Room 233A
Jefferson City, Missouri 65101

Dear Representative David:

This opinion letter is in response to your questions which can be summarized as follows:

Does Section 311.332.3, RSMo Supp. 1987 authorize a licensed wholesaler to classify as close out merchandise packages or bottles of a brand or trade name limited to a size or capacity of that brand or trade name, e.g., half pints only?

Is the term "item" in the definition of close out merchandise under this section synonymous with the term "brand"?

Section 311.332, RSMo was repealed and reenacted in 1987. Subsections 2 and 3 of Section 311.332, RSMo Supp. 1987 provide as follows:

2. Except as provided in subsection 3 of this section, any wholesaler licensed to sell intoxicating liquor and wine containing alcohol in excess of five percent by weight to persons duly licensed to sell such intoxicating liquor and wine at retail may offer a price reduction of not more than four percent of his price schedule for any brand, age, proof, and size bottle or package. Such price reduction shall apply for a thirty-day period, shall not be offered by any wholesaler more than three times in any calendar year, and shall not be offered during successive months.

3. Any wholesaler licensed to sell intoxicating liquor and wine containing alcohol in

excess of five percent by weight to persons duly licensed to sell such intoxicating liquor and wine at retail may offer a price reduction of more than four percent of the scheduled price on close out merchandise. "Close out merchandise" is any item which has been in the wholesaler's inventory for more than six months. The price of close out merchandise may be decreased, but shall not be increased, monthly for up to and including six consecutive months. A wholesaler shall not purchase any item of intoxicating liquor or wine of the same year and vintage he has classified as close out merchandise during the period of such classification. A wholesaler shall not purchase, sell, or offer to sell any item of intoxicating liquor or wine of the same year and vintage he has classified as close out merchandise until eighteen months have elapsed since the wholesaler's last offer to sell the item as close out merchandise. This subsection shall become effective January 1, 1988. (Emphasis added.)

Subsection 3 of Section 311.332 became effective January 1, 1988.

Under subsection 2 of Section 311.332, any licensed wholesaler may reduce the price of his merchandise as therein defined by not more than four percent of his price schedule for any "brand, age, proof, and size bottle or package". Subsection 3 of Section 311.332 defines close out merchandise as any "item. . .". In that same subsection the wholesaler is prohibited from purchasing any "item of intoxicating liquor or wine" of the same year and vintage he has classified as close out merchandise during the period of such classification.

The principal rule of statutory construction is to determine legislative intent from the plain words of the enactment. Bartlett and Company Grain v. Director of Revenue, 649 S.W.2d 220, 223 (Mo. 1983). Section 1.090, RSMo 1986. Under the plain meaning rule the main object of statutory interpretation is to determine the legislative intent from the language used and to give effect to the intent. In so doing, words used in the enactment are given their plain and ordinary meaning. Springfield Park Central Hospital v. Director of Revenue, 643 S.W.2d 599, 600 (Mo. 1983).

In Webster's New World Dictionary, Second College Edition, 1982, the word "item" is defined as "an article; unit; separate thing; particular". It has equally been applied by the dictionary definition "to any single thing or small section that is part of a whole structure, stresses the distinctness of a thing as an individual unit in a whole".

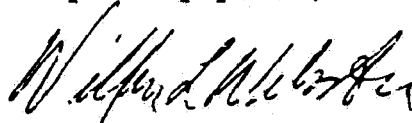
Brand is defined thereunder as "an identifying mark or label on the products of a particular company; trademark".

In reviewing the current rules and regulations of the Division of Liquor Control, Department of Public Safety, particularly 11 C.S.R. 70-2.190(2)(A)1, wholesalers post prices for new brands which must be authorized by the supervisor of liquor control. 11 C.S.R. 70-2.190(2)(A)2 provides that "(A)ny new "items" in the state, including new products, new sizes or new proofs being posted on supplemental schedules may be posted at any price the wholesaler desires. This category of new items must be posted within the same calendar month. ..."

Additionally, under the rules and regulations of the Division of Liquor Control, 11 C.S.R. 70-2.190(2)(F)1, "item" is defined as "... either a bottle or a case of intoxicating liquor or wine scheduled as hereby required."

"Item" has a distinct and separate meaning from "brand". The Missouri legislature in its 1987 repeal and reenactment of Section 311.332 recognized the basic difference between these two plain and ordinary words. "Item" is something less than "brand". The clear legislative intent when applying rules of construction authorizes a licensed wholesaler to classify as close out merchandise packages or bottles of a brand or trade name limited to size or sizes. Classifying a size or sizes as close out merchandise does not require classifying the entire brand of which the size or sizes may be a part thereof. The word "item" is not synonymous with "brand" for the purposes of Section 311.332, RSMo Supp. 1987.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

MENTAL HEALTH, DEPARTMENT OF: The Department of Mental
STATE CONTRACTS: Health may not contract out
the operation of a state-owned
residential facility for the mentally ill to a private
not-for-profit entity.

May 4, 1988

OPINION NO. 95-88

The Honorable Phil B. Curls
Senator, District 9
State Capitol Building, Room 219
Jefferson City, Missouri 65101

Dear Senator Curls:

This opinion is in response to your questions asking:

Does the Department of Mental Health
have the authority to contract for the
operation of a residential facility for the
mentally ill with a private not-for-profit
entity?

If the answer to the above question is yes,
is there any impact if the facility was built
with state revenue bond money?

What is the effect of Article III, Section
38(a) on any power the Department of Mental
Health may have to contract such operations?

The information you provided indicates your question relates to
the Department of Mental Health contracting out the operation of
a state-owned facility.

Article IV, Section 37(a) of the Missouri Constitution
(as adopted 1972), provides that the Missouri Department of
Mental Health:

...shall provide treatment, care, education
and training for persons suffering from mental
illness or retardation, shall have
administrative control of the state hospitals
and other institutions and centers established
for these purposes and shall administer such
other programs as provided by law. (Emphasis
added.)

The Department of Mental Health is comprised of several divisions. The Division of Comprehensive Psychiatric Services is responsible for the delivery of services by the Department to persons afflicted with mental illness. Section 632.010, RSMo 1986, specifically provides in part:

[t]he division shall have and exercise supervision of division residential facilities, day programs and other specialized services operated by the department and oversight over facilities, programs and services funded or licensed by the department.

The Department of Mental Health may purchase services for its clients. Section 630.405, et seq. RSMo 1986. The procedure for purchasing such services must comply with rules of the Commissioner of Administration establishing procedures consistent with the usual state purchasing procedures under Chapter 34, RSMo. In addition, certain provisions in Chapter 632, RSMo 1986, such as Section 632.025, authorize contracting for services. However, none of these sections authorize a contract such as that which is the subject of your question.

There is no statutory provision authorizing the contracting out of the operation of a state-owned residential facility to a private not-for-profit entity. Given the constitutional mandate of Article IV, Section 37(a) of the Missouri Constitution for administrative control by the Department and the statutory responsibility imposed by Section 632.010 on the Division of Comprehensive Psychiatric Services to have supervision of state-owned facilities, we conclude the Department may not contract out the operation to a private not-for-profit entity.

See also Missouri Attorney General Opinion No. 93-83, a copy of which is enclosed, wherein this office concluded the Department of Corrections and Human Resources may not contract out the operation of adult correctional facilities to private entities except for the operation of halfway houses.

Since our answer to your first question is no, it is not necessary to address your second and third questions.

CONCLUSION

It is the opinion of this office that the Department of Mental Health may not contract out the operation of a state-owned residential facility for the mentally ill to a private not-for-profit entity.

Very truly yours,

A handwritten signature in cursive script, appearing to read "William L. Webster".

WILLIAM L. WEBSTER
Attorney General

Enclosure:

Attorney General Opinion No. 93-83



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

May 4, 1988

OPINION LETTER NO. 98-88

The Honorable Chuck Surface
Representative, District 128
State Capitol Building, Room 109H
Jefferson City, Missouri 65101

Dear Representative Surface:

This opinion letter is in response to your question asking whether Section 19-31 of the Joplin City Code imposing a license fee upon "truck terminals or truck loading and unloading depots" violates Section 390.126.2, RSMo 1986.

Section 390.126.2, RSMo 1986, provides:

2. No other or additional policies, bonds or licenses than those prescribed in this chapter shall be required of any motor carrier to which the provisions of this chapter apply by any city, town or other subdivision of the state; provided, that this section shall not be so construed as to interfere with the right of any county, city or other civil subdivision of the state, to levy and collect any property tax to which such motor carrier is liable under the general revenue laws of this state within such county, city or other civil subdivision wherein the property of such motor carrier may be subject to assessment and taxation.

-(Emphasis added.)

Based on the information you have provided, we understand a motor carrier as defined by Section 390.020(17), RSMo 1986, thus

The Honorable Chuck Surface

subject to the provisions of Section 390.126.2, has a terminal for its trucks in Joplin, Missouri. The City of Joplin requires under its code a license to operate a truck terminal or truck loading and unloading depot. It is our understanding further that this motor carrier uses its terminal only for its vehicles and does not act as a depot or terminal for other vehicles or as a truck stop available to all motor vehicles along the highways and to the traveling public.

In City of Nevada v. Bastow, 328 S.W.2d 45 (Mo. App. 1959), the owner of a tractor-trailer truck was charged with failure to purchase a city license as required by city ordinance. The appellate court ruled the city was not authorized to impose such license tax on the owner of the tractor-trailer truck. In discussing Chapter 390 and, in particular, Section 390.126.2, the appellate court stated:

Chapter 390, in addition to its regulatory provisions as to motor carriers, levies taxes and license fees against them, and then declares that no additional license shall be required of them by any city or town. The quoted clause of Section 390.126, subd. 2 seems to be plain and unambiguous in its meaning. Any doubt as to its reasonable meaning is further clarified by the provision that it shall not be construed so as to interfere with the right of any city to collect any property tax to which such motor carrier is liable under the general revenue laws. By removing "property tax" from the ban against city taxation the legislature clearly indicated its intention that the exemption should apply to all other city taxes -- certainly as to all city licenses.

(Emphasis added.)

What the City of Joplin has done is to indirectly license the motor carrier by requiring a license for its terminal. There is simply no practical difference in this case between the motor carrier and its terminal, they are basically one and the same. We do not believe that the City of Joplin can avoid the exemption in the statute by placing the requirement of the license on the terminal under the facts in this case. There may be factual distinctions between how this particular motor carrier operates and other motor carriers. To allow the City of Joplin to impose such licensing requirements is contrary to the

The Honorable Chuck Surface

express provisions of Section 390.126.2. Therefore, in the situation about which you are concerned, it is the opinion of this office that the City of Joplin may not impose a license fee on the truck terminal in question.

Very truly yours,

A handwritten signature in cursive script, appearing to read "William L. Webster".

WILLIAM L. WEBSTER
Attorney General

COMPENSATION: The Public Administrator appointed
COUNTIES: for Buchanan County on June 19,
PUBLIC ADMINSTRATOR: 1987 is to be paid for 1987 a
pro-rata portion of the four
thousand dollars (\$4,000.00) authorized by Section 473.739, RSMo
1986, based on the time served in office.

December 22, 1988

OPINION NO. 100-88

Michael A. Insco
Buchanan County Prosecuting Attorney
Buchanan County Courthouse
St. Joseph, Missouri 64501

Dear Mr. Insco:

This opinion is in response to your question asking:

Is the individual appointed June 19, 1987
to fill the unexpired term of the public
administrator in Buchanan County entitled
to all or a portion of the four thousand
dollars authorized by Section 473.739, RSMo
1986, if she completed the training
provided for by Section 67.130, RSMo 1986,
and did not receive fifteen thousand
dollars in fees during the year of her
appointment?

You have informed us the Governor appointed an individual
on June 19, 1987, to fill the unexpired term of the Public
Administrator of Buchanan County who had resigned. She
completed the training requirements of Chapter 67, RSMo 1986,
and received less than fifteen thousand dollars in fees during
the year 1987.

Section 473.739, RSMo 1986, provided:

473.739. Compensation for attendance at
training sessions for county officials,
certain administrators.--Each public
administrator, except in counties of the
first class with a charter form of

Michael A. Insco

government, who does not receive at least fifteen thousand dollars in fees as otherwise allowed by law in the years 1984 and 1985, upon certification of the Missouri Association of Public Administrators of attendance at a training program required by the provisions of section 67.130, RSMo, shall receive annual compensation of four thousand dollars for the year 1985, and a proportionate part of four thousand dollars for that part of the year 1984 when this section is in effect, for the added duty of attending the training program required by the provisions of section 67.130, RSMo. This additional compensation shall be paid on January 1, 1985, for that part to which he is entitled for the year 1984, and on January 1, 1986, for that to which he is entitled for the year 1985, or as soon after those dates as the public administrator may be able to establish the total of the fees paid for those years.

Section 67.130, RSMo 1986, provides that training programs be established for certain public administrators which training programs consist of not less than twenty nor more than thirty hours of actual instruction per year. Under Section 67.134, RSMo 1986, the termination date of Sections 473.739 and 67.130 was extended until January 1, 1988, except that payments to public administrators pursuant to Section 473.739 may be made after January 1, 1988.

Your question is whether she is entitled to the entire four thousand dollars in additional compensation or whether that amount should be pro-rated with her receiving an amount proportional to the time served. This office has held in previous opinions that compensation that is paid on a yearly basis should be pro-rated. See Attorney General Opinion Letter No. 26-85, a copy of which is enclosed. The appointed public administrator should be eligible for the proportion of the annual compensation which she personally earned. See also Kirkpatrick v. Rose, 344 S.W.2d 59, 64 (Mo. 1961). It is our opinion that the four thousand dollars authorized by Section 473.739 is additional "annual compensation" and, therefore, such compensation should be pro-rated for the year 1987.

Michael A. Insko

CONCLUSION

It is the opinion of this office that the Public Administrator appointed for Buchanan County on June 19, 1987 is to be paid for 1987 a pro-rata portion of the four thousand dollars (\$4,000.00) authorized by Section 473.739, RSMo 1986, based on the time served in office.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

Enclosure:

Opinion Letter No. 26-85

JUNIOR COLLEGE DISTRICTS:
JUNIOR COLLEGES:

A candidate for trustee of East Central College is not required by Section 178.820.5, RSMo 1986, to have been a voter of his or her particular subdistrict for at least one whole year next preceding the election.

April 18, 1988

OPINION NO. 101-88

The Honorable Wesley A. Miller
Representative, District 108
State Capitol Building, Room 107
Jefferson City, Missouri 65101

Dear Representative Miller:

This opinion is in response to your questions concerning the election of trustees for East Central College. You state your questions as follows:

In light of the Policy and the Statute [Section 178.820, RSMo 1986], does running "at-large" deal only with who has a right to vote for candidates? Or does the terminology "at-large", even though there are Sub-Districts, do away with the candidacy requirement in Sub-Districts that the candidate be a voter of the Sub-District for one (1) year next preceding the election?

Several years ago, following the procedure set out in Section 178.820, RSMo 1986, the Junior College District of East Central Missouri obtained the approval of the Coordinating Board for Higher Education for a redistricting plan. A redistricting plan may incorporate one of three redistricting options set forth in subsection 2 of Section 178.820:

(1) Each trustee may be elected only by the voters of his or her particular subdistrict;

(2) One or more trustees may be elected at large and the remainder from subdistricts;

The Honorable Wesley A. Miller

(3) The trustees may be elected at large with the requirement that each must reside in a certain subdistrict.

As the following quotation from the plan demonstrates, East Central chose the third of the redistricting options:

This redistricting plan proposes that the East Central Junior College District shall be divided into three subdistricts, each comprised of contiguous territory and of substantially equal population. This means that two trustees will be elected from each subdistrict.

The plan provides that the subdistricts will be only used for filing purposes and that the election of trustees will continue to be on an at-large basis as provided for in statute 178.820. Page 2 of the Plan.

Qualifications of trustees are provided as follows in subsections 2, 4 and 5 of Section 178.820:

2. The redistricting plan . . . may provide . . . for the election of all the trustees at large with the requirement that each must reside in a certain subdistrict

4. Any person running for election as a trustee of a subdistrict shall be domiciled and a resident therein. . . . Upon approval, the redistricting plan shall become effective and all trustees elected thereafter shall be required to be elected from subdistricts in which they are resident. . . .

5. Candidates for the office of trustee shall be citizens of the United States, at least twenty-one years of age, who have been voters of the district for at least one whole year preceding the election, and if trustees are elected other than at large they shall be voters of the subdistricts for at least one whole year next preceding the election. . . .

The Honorable Wesley A. Miller

(Emphasis added.)

Your question is whether the above underlined portion of subsection 5 requires trustees from the subdistricts in East Central's plan to be voters of their respective subdistricts for at least one whole year next preceding the election.

The answer is that this requirement is not applicable to trustees under the third redistricting option. This requirement applies only when a redistricting plan has adopted the first or second of the options. (In the case of the second option, the requirement would apply only to "the remainder [of the trustees] from subdistricts"). The language of the requirement in subsection 5 about being a voter of a particular subdistrict for at least one whole year next preceding the election specifically excepts from its coverage trustees elected "at large". The phrase "at large" is the same phrase used to describe the trustees elected under the third option in subsection 2 ("election of all the trustees at large with the requirement that each [trustee] must reside in a certain subdistrict") which is the option incorporated into the redistricting plan in question. When "the same term [is] used in different parts of the same statute [it] should be given the same interpretation." United States v. Brunett, 53 F.2d 219, 234 (Mo. 1931), accord, Huff v. Union Electric Company, 598 S.W.2d 503, 511 (Mo.App. 1980). Therefore, the exception for "at large" trustees in subsection 5 refers to the same "at large" trustees described in the third option in subsection 2. This conclusion is supported by the fact that the legislature wrote a subdistrict residence requirement into the third option ("each [trustee] must reside in a certain subdistrict") -- words which would have been redundant if the subdistrict voter requirement of subsection 5 were applicable.

Conclusion

It is the opinion of this office that a candidate for trustee of East Central College is not required by Section 178.820.5, RSMo 1986, to have been a voter of his or her particular subdistrict for at least one whole year next preceding the election.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

GROUP INSURANCE: The provisions of Section 169.590,
HEALTH INSURANCE: RSMo Supp. 1987, are not applicable to
INSURANCE: junior college districts.
JUNIOR COLLEGE DISTRICTS:
SCHOOL DISTRICTS:
SCHOOLS:

August 3, 1988

OPINION NO. 102-88

The Honorable Tom McCarthy
Senator, District 26
State Capitol Building, Room 427
Jefferson City, Missouri 65101

Dear Senator McCarthy:

This opinion is in response to your question which you state as follows:

Section 169.590, RSMo Supp. 1987, requires Missouri School districts which provide health insurance to its employees to permit retired employees who are drawing, or are eligible to draw, retirement benefits under Chapter 169, RSMo, to purchase insurance through the districts' group policies. The statute does not further define "Missouri School District." My question is this: Does Section 169.590 apply to Junior College districts whose retired employees are covered by Chapter 169, RSMo?

Section 169.590, RSMo Supp. 1987, provides in pertinent part as follows:

169.590. Health insurance plans for school district employees to include retirees, surviving spouses, when--surviving children, when--premiums.--1. Any insurance contract or plan issued or renewed after December 31, 1987, which provides group health insurance for employees of any Missouri school district shall contain provisions that permit:

The Honorable Tom McCarthy

(1) Any employee of such district who retires, or who has retired, and is receiving or is eligible to receive retirement benefits under this chapter to remain or become a member of the group;

(2) The surviving spouse of any employee to remain or become a member of the group, so long as such spouse is receiving or is eligible to receive retirement benefits under this chapter; and

(3) The surviving children of any employee to remain or become members of the group, so long as they are receiving or are eligible to receive retirement benefits under this chapter. (Emphasis added.)

* * *

Section 169.590 contains no definition of "school district." That section was enacted as Section 1 of Senate Bill No. 264, 84th General Assembly, First Regular Session, (Laws of Missouri, 1987, p. 571). Section 1 was added to Senate Bill No. 264 (which already contained amendments to Sections 169.070 and 169.660, RSMo 1986) by House Amendment No. 1. House Journal, Eighty-Fourth General Assembly, First Regular Session, pp. 1527-1529. There is nothing in the legislative history to help interpret the meaning of "school district."

Section 169.590, by its terms, applies to those individuals receiving retirement benefits under Chapter 169, RSMo. When a statute provides no definition for a particular term and when its legislature history provides no clue to the legislature's intent, the "meaning must be determined solely from the language used and its context and in keeping with other statutes of the same or similar nature." State ex rel. Stamm v. Mayfield, 340 S.W.2d 631, 634 (Mo. banc 1960). This is true even if the statutes are in different chapters or were passed on different dates. Weber v. Missouri State Highway Commission, 639 S.W.2d 825, 829 (Mo. 1982) and Gamble v. Hoffman, 695 S.W.2d 503, 508 (Mo.App. 1985). We will, therefore, examine the provisions in Chapter 169 to determine if junior college districts come within the term "school district" as used throughout Chapter 169.¹

There are four groups of statutes in Chapter 169 which create retirement systems for school districts. The first group includes Sections 169.010 to 169.140 which provide for the "The

The Honorable Tom McCarthy

Public School Retirement System." The second group comprises Sections 169.270 to 169.400 which create a public school retirement system in each school district which falls within the population criteria set out in Section 169.280.1 (400,000 to 700,000). The third group includes Sections 169.410 to 169.540 which create local public school retirement systems for school districts of the state having a population of 700,000 or more. The final group is composed of Sections 169.600 to 169.710 which provide retirement benefits for non-teacher employees in local school districts.

In regard to The Public School Retirement System, the term "school district" as such is not defined. However, the term "district" is defined to mean "public school, as herein defined." Section 169.010(4), RSMo Supp. 1987. "Public school" is defined in subsection 12 of that statute as:

(12) "Public school" shall mean any school conducted within the state under the authority and supervision of a duly elected district or city or town board of directors or board of education and the board of regents of the several state teachers' colleges, or state colleges, board of trustees of the public school retirement system of Missouri, and also the state of Missouri and each county thereof, to the extent that the state and the several counties are employers of teachers as herein designated;

This definition does not include junior college districts since they have boards of trustees and not boards of directors, boards of education or boards of regents. Section 178.820, RSMo 1986. Further evidence supporting this conclusion is found in the fact that the legislature, as a part of the junior college statutes, included a separate statutory provision in which The Public School Retirement System is made expressly applicable to junior college districts. Section 178.860, RSMo 1986. A more comprehensive enactment providing for application of The Public School Retirement System to certain employees of a "public junior college, college or university" is found at Section 169.140, RSMo Supp. 1987.

The definitions in those statutes pertaining to school districts containing between 400,000 to 700,000 people also do not include junior college districts. "School district" is defined in Section 169.270(17), RSMo 1986 as "any school district in which a retirement system shall be established under

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section 169.280." However, Section 169.280.1 which provides a means by which the retirement system is established, refers to the governing body of the school district as a "board of education." That term is defined in subsection 6 of Section 169.270, RSMo 1986, as "the board of directors or corresponding board, by whatever name, having charge of the public schools of the school district in which the retirement system is established." Further elucidating the meanings of these terms are definitions in Chapter 160 which chapter is in pari materia to Chapter 169 because it contains provisions generally applicable to all school districts. Weber v. Missouri State Highway Commission, supra. Section 160.011(1) defines "school district", when used alone, as including "six director, urban, and metropolitan school districts." The term "public school" is defined in subdivision (7) as including "all elementary and high schools operated at public expense." Taking into consideration the definitions in Section 169.270 along with the use of the terms "school district" and "public school" in the rest of Chapter 169 and in Chapter 160, there was no intent to include junior college districts in Section 169.270.

In regard to school districts of 700,000 or more, the definition of "public school" does not cover junior college districts since, as stated above, junior college districts are not governed by a board of education or a board of regents. Section 169.410(15), RSMo Supp. 1987 defines public school as:

"any school for elementary, secondary or higher education, open and public, which is supported and maintained from public funds and which is operated by the board of education of the school district or by the board of regents." (Emphasis added.)

In regard to non-teacher employees of school districts, since 1975, Section 169.600 (Laws of Missouri, 1975, p. 216) has contained a separate provision for junior college districts to include their eligible employees in the retirement system created by Sections 169.600 to 169.710. This demonstrates that junior college districts are not considered to be "public school districts" as that latter term is defined in Section 169.600(12), RSMo 1986.² See Attorney General Opinion No. 79, Donahoe, March 17, 1966, a copy of which is enclosed, issued before the 1975 amendment, opining that the definition of "public school district" in Section 169.600 did not include junior college districts.

From this review of Chapter 169, we conclude that where the legislature intends for junior college districts to be included in the retirement provisions of Chapter 169, it expresses that

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intent explicitly. This is consistent with the legislature's treatment of junior college districts in other statutes relating to school districts. For instance, Chapter 163, RSMo, provides for state aid to public schools by designating state aid to go to "school districts." Section 163.021, RSMo 1986. Despite the use of the term "school districts," the legislature found it necessary to make separate and explicit provision for state aid to junior college districts in Section 163.191, RSMo Supp. 1987. See also our previous discussion of the term "school district" in Chapter 160. Therefore, we conclude that since Section 169.590 makes no express reference to junior college districts, the provisions of that section do not apply to junior college districts.

In arriving at this conclusion, we are not expressing our opinion as to whether the term "school district" as used in any other statute could not possibly include junior college districts. The interpretation of such term must always be decided in the context of the particular statute with its particular purpose and in reference to any other statutes which are in pari materia. Compare Opinion No. 298, Holman, May 13, 1966, opining that junior college districts are "school districts" as that term is used in Section 108.240, RSMo, with Opinion No. 59, Ryan, March 17, 1970, opining that junior college districts are not within the term "school district" as used in the Teacher Tenure Act (Sections 168.102 to 168.130, RSMo).

Conclusion

It is the opinion of this office that the provisions of Section 169.590, RSMo Supp. 1987, are not applicable to junior college districts.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

Enclosure: Opinion No. 79, Donahoe, March 17, 1966
Opinion No. 298, Holman, May 13, 1966
Opinion No. 59, Ryan, March 17, 1970

[1]The formation and operation of junior college districts is provided for in Sections 178.770 to 178.890, RSMo 1986. Section

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163.191.4, RSMo Supp. 1987, provides the following definition of "community junior college:"

4. A "community junior college" is an institution of higher education deriving financial resources from local, state, and federal sources, and providing postsecondary education primarily for persons above the twelfth grade age level, including courses in: (a) liberal arts and sciences, including general education; (b) occupational, vocational-technical; and (c) a variety of educational community services. Community junior college course offerings lead to the granting of certificates, diplomas, and/or associate degrees, but do not include baccalaureate or higher degrees.

[2] In 1984, the legislature passed Section 169.611 which contains more detailed provisions for the merger of a junior college district non-teacher employee retirement system into the system created by Sections 169.600 to 169.710 (Laws of Missouri, 1984, p. 463).

SCHOOLS: The Missouri School Boards'
SCHOOL BOARD ASSOCIATION DUES: Association is a "quasi-public
SCHOOL BOARDS: governmental body" as defined in
SUNSHINE LAW: Section 610.010(2), RSMo Supp.
1988, and subject to the
provisions of Chapter 610, RSMo, the Sunshine Law.

December 22, 1988

OPINION NO. 103-88

The Honorable Tom McCarthy
Senator, District 26
State Capitol Building, Room 427
Jefferson City, Missouri 65101



Dear Senator McCarthy:

This opinion is in response to your question asking whether the provisions of Chapter 610, RSMo, commonly known as Missouri's "Sunshine Law," are applicable to the Missouri School Boards' Association (hereinafter "the Association"). A memorandum accompanying your question states that the Association is incorporated as a not-for-profit corporation under Chapter 355, RSMo. The memorandum also notes that Section 162.011, RSMo 1986, authorizes a local school board to use money in the incidental fund of the district to pay membership dues to the Association.

Specifically, Section 162.011, RSMo 1986, provides:

162.011. School boards may associate and appoint a member to attend meetings--may pay dues and attendance expenses.--Any school board of the state of Missouri, when it deems it a matter of public interest, may by two-thirds vote of its members join the Missouri School Boards' Association and appoint one or more of its members to attend meetings called by the association within the state of Missouri. The school board may direct payment of the membership dues of the association and of the actual and necessary expenses incurred by members in attending the meetings called by the association from the incidental fund of the district.

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Since Chapter 610 applies to all statutorily defined public governmental bodies, the answer to your question depends upon whether the Association is a public governmental body. A public governmental body is defined in Section 610.010(2), RSMo Supp. 1988, as:

(2) "Public governmental body", any legislative, administrative governmental entity created by the constitution or statutes of this state, by order or ordinance of any political subdivision or district, or by executive order, including any body, agency, board, bureau, council, commission, committee, board of regents or board of curators of any institution of higher education, supported in whole or in part from state funds, advisory committee or commission appointed by the governor by executive order, department, or division of the state, of any political subdivision of the state, of any county or of any municipal government, school district or special purpose district, any other legislative or administrative governmental deliberative body under the direction of three or more elected or appointed members having rulemaking or quasi-judicial power, any committee appointed by or under the direction or authority of any of the above named entities and which is authorized to report to any of the above named entities, and any quasi-public governmental body. The term "quasi-public governmental body" means any corporation organized or authorized to do business in this state under the provisions of chapter 352, 353, or 355, RSMo, or unincorporated association which (a) performs a public function, and which (b) has as its primary purpose to enter into contracts with public governmental bodies, or to engage primarily in activities carried out pursuant to an agreement or agreements with public governmental bodies; except urban redevelopment corporations organized or authorized to do business under the provisions of chapter 353, RSMo, which are privately owned, operated for profit, and do not expend public funds;

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This definition, along with all other provisions of Chapter 610, must be interpreted within the framework of the public policy declared in Section 610.011, RSMo Supp. 1988.

610.011. Liberal construction of law to be public policy.--1. It is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law. Sections 610.010 to 610.028 shall be liberally construed and their exceptions strictly construed to promote this public policy.

2. Except as otherwise provided by law, all public meetings of public governmental bodies shall be open to the public as set forth in section 610.020, all public records of public governmental bodies shall be open to the public for inspection and copying as set forth in sections 610.023 to 610.026, and all public votes of public governmental bodies shall be recorded as set forth in section 610.015.

The Association is a private, not-for-profit corporation organized and authorized to do business under Chapter 355, RSMo. Therefore, it is a "quasi-public governmental body" if it "performs a public function" and "has as its primary purpose to enter into contracts with public governmental bodies, or to engage primarily in activities carried out pursuant to an agreement or agreements with public governmental bodies." Section 610.010(2), RSMo Supp. 1988.

The Constitution of the Association defines the purpose of the Association as follows:

The purpose of the Association shall be to aid and assist Boards of Education in performing their lawful functions, and to promote, support, and advance the interests of public education in Missouri.

Further elaboration of the Association's purpose and its activities in furtherance thereof can be found in the "Articles of Acceptance Under the General Not For Profit Corporation Act" filed in the Circuit Court of Cole County on November 20, 1958. Article III, Section 6 states:

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The purpose or purposes for which the corporation is organized are:

The purpose of the Missouri School Boards Association shall be the constant improvement of public school education for all the children of Missouri. To that end it shall cooperate to the fullest extent with public officials, school administrators, teachers and all other interested individuals and organizations; study educational problems and inform school boards of the results of such studies and studies made by others, and in particular, act as an agency to enable individual school districts to cooperate with each other for services which can be provided as a common service but which would not be practical to provide in each school district.

This office examined the issue of quasi-public governmental bodies in Opinion No. 27-87, a copy of which is enclosed. In that opinion, a question was presented as to whether area agencies on aging, incorporated under Chapter 355, RSMo, are quasi-public governmental bodies. The function of these agencies is to "develop an area plan and to carry out, directly or through contractual or other arrangements, a program in accordance with the plan within the planning and service area." 42 U.S.C. Section 3025(c). These agencies are also empowered to make grants or enter into contracts with public or private agencies to provide social or health services. The opinion concluded that such agencies are quasi-public governmental bodies.

In Champ v. Poelker, 755 S.W.2d 383 (Mo.App. 1988), the Missouri Court of Appeals concluded that the Convention and Visitors Bureau of Greater St. Louis constitutes a quasi-public governmental body. The Bureau, having entered into a contract with St. Louis County in 1982 for promotion of tourism and convention business in the County, could reasonably be interpreted as performing a public function pursuant to its agreement. Id. at 391.

There is no question that public education is a "public function." Article IX, Section 1(a) of the Constitution of Missouri provides:

The Honorable Tom McCarthy

A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law.

To that end, in Section 160.051, RSMo Supp. 1988, the legislature has provided for "[a] system of free public schools . . . throughout the state." With its purposes "to promote, support, and advance the interests of public education" and to work for "the constant improvement of public school education," the Association clearly performs a "public function."

The second test to determine whether the Association is a quasi-public governmental body is whether its primary purpose is to enter into contracts with public governmental bodies or to engage primarily in activities pursuant to agreements with public governmental bodies. Your question does not mention that the Association has entered into contracts with public governmental bodies.

However, the alternative component, that the Association engages primarily in activities pursuant to agreements with public governmental bodies, is found here. First, the statement of purpose in the Articles of Acceptance must be noted. The Association is to "cooperate to the fullest extent" with public and school officials; "study educational problems and inform school boards of the results of such studies;" and "act as an agency to enable individual school districts to cooperate with each other for services." All of these activities involve agreements with public governmental bodies.

Further, since membership dues are paid from public funds pursuant to Section 162.011, RSMo 1986, there is little question of the public nature of the Association's activities.

Since the Association meets the definition of a quasi-public governmental body and, therefore, is subject to the provisions of Chapter 610, RSMo, this opinion need not address the question of whether the Association is a public governmental body as defined elsewhere in Section 610.010(2), RSMo Supp. 1988. See Spain v. Louisiana High School Athletic Association, 398 So.2d 1386 (La. 1981), wherein the Supreme Court of Louisiana held the Louisiana High School Athletic

The Honorable Tom McCarthy

Association is a "public body" under the Louisiana Open Meetings Law and thus subject to that law.

CONCLUSION

It is the opinion of this office that the Missouri School Boards' Association is a "quasi-public governmental body" as defined in Section 610.010(2), RSMo Supp. 1988, and subject to the provisions of Chapter 610, RSMo, the Sunshine Law.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

Enclosure: Opinion No. 27-87

CONTINUING EDUCATION:
ECONOMIC DEVELOPMENT,
DEPARTMENT OF:
HEALING ARTS, BOARD OF:
PHYSICIANS:

The State Board of Registration
for the Healing Arts may,
pursuant to Section 334.075,
RSMo Supp. 1987, require
continuing education for
physicians to be completed over

a time period in excess of one year.

April 18, 1988

OPINION NO. 104-88

The Honorable Jerry E. McBride
Representative, District 144
State Capitol Building, Room 411
Jefferson City, Missouri 65101

Dear Representative McBride:

This opinion is in response to your question which you
state as follows:

Section 334.075 RSMo requires the State
Board of Healing Arts to administer a
continuing education program for physicians
licensed in this state. The specific
question of law is: "Does this section
require the Board to establish and enforce
an annual requirement or is the Board
afforded the discretion to operate a
multi-year requirement more parallel to
established professional systems of
continuing education?"

Section 334.075, RSMo Supp. 1987, provides:

334.075. Renewal of certificate,
minimum continuing education requirement,
exception, retired physicians. -- The
board shall not renew any certificate of
registration unless the licensee shall
provide satisfactory evidence that he has
complied with the board's minimum require-
ments for continuing education. At the
discretion of the board, compliance with
the provisions of this section may be
waived for licensed physicians who have
discontinued their practice of medicine
because of retirement.

The Honorable Jerry E. McBride

The question is whether the State Board of Registration for the Healing Arts (hereinafter "the Board") has the discretion to impose continuing education requirements for a multi-year time period or whether the Board must impose continuing education requirements that are to be completed on an annual basis.

A fundamental tenet of statutory construction is that words used in statutes are to be considered in their plain and ordinary meaning in order to ascertain the intent of the lawmakers. Beiser v. Parkway School District, 589 S.W.2d 277, 280 (Mo. banc 1979). The primary object of statutory interpretation is to ascertain the intent of the legislature from the language used and to give effect to that intent. In so doing, words used in the statute are to be given their plain and ordinary meaning. Springfield Park Central Hospital v. Director of Revenue, 643 S.W.2d 599, 600 (Mo. 1983). When a statute is plain and unambiguous, there is no reason for construction and it must be applied by the courts as it was written by the legislature. United Air Lines, Inc. v. State Tax Commission, 377 S.W.2d 444, 448 (Mo. banc 1964).

Section 334.075 gives the Board the authority to mandate continuing education requirements. However, that section provides no time frame within which the Board must require licensees to complete continuing education requirements. The Board is given authority to waive such requirements for those physicians who have retired.

The statute does not require the Board mandate continuing education be obtained within a 12-month period. Courts are not allowed to "enlarge or extend a statute by construction unless it is necessary to obviate repugnancy and inconsistency and to give effect to the manifest intention of the legislature by the application of sound principles of interpretation." State ex rel. Hall v. Bauman, 466 S.W.2d 177, 180 (Mo. App. 1971). By the same token, the Board does have the authority to mandate continuing education to be completed within 12 months if it so chooses. However, to allow the Board the discretion to require licensees to complete the continuing education requirements over a series of years is not repugnant to nor inconsistent with Section 334.075.

We have reviewed several licensing bodies that also have continuing education requirements. Licensees of the Board of Pharmacy, the Board of Optometry, and the Board of Podiatry must complete the continuing education requirements within a 12-month period. See Sections 338.060.3, 336.080, and 330.070.4, RSMo 1986. Under Section 339.040.7, RSMo 1986, continuing education for licensees of the Real Estate Commission must be fulfilled

The Honorable Jerry E. McBride

over a two-year period, while Section 326.110.2(5), RSMo 1986, relating to licensees of the Board of Accountancy, refers to a three-year time period. Construing Section 334.075 to allow the Board discretion in mandating compliance with continuing education requirements over a multi-year period would be in harmony with the other licensing statutes cited herein and accomplish the intent of the legislature to require licensed individuals to maintain their competence.

Conclusion

It is the opinion of this office that the State Board of Registration for the Healing Arts may, pursuant to Section 334.075, RSMo Supp. 1987, require continuing education for physicians to be completed over a time period in excess of one year.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P O Box 800
3141731 3321

April 7, 1988

OPINION LETTER NO. 106-88

The Honorable Frank Bild
Senator, District 15
State Capitol Building, Room 331A
Jefferson City, Missouri 65101

Dear Senator Bild:

This letter is in response to your questions concerning the selection of delegates to the Republican National Convention. We have been informed that based on the popular vote in the recent presidential primary, George Bush is entitled to nineteen delegates to the Republican National Convention, Bob Dole is entitled to nineteen delegates to the Republican National Convention, and nine delegates are to be uncommitted. We have further been informed that Bob Dole has now formally withdrawn as a candidate for President of the United States. You have asked:

At time of selection as national convention delegates, must the congressional district and state conventions select delegates committed to Senator Dole in proportion to the popular vote cast in the Presidential Primary? How will the delegates committed to Senator Dole be distributed? Will they be delegated for Vice President George Bush or uncommitted?

The questions you have posed involve construing Section 115.776, RSMo 1986 and Section 115.780, RSMo 1986. A copy of Section 115.776 is attached hereto as "Appendix I" and a copy of Section 115.780 is attached hereto as "Appendix II". The primary rule of statutory construction is to ascertain the intent of the lawmakers from the language used, to give effect to that intent if possible, and to consider words used in a statute in their plain and ordinary meaning. Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397 (Mo. banc 1986).

The Honorable Frank Bild

Subsection 6 of Section 115.776 specifically provides that congressional district delegates and alternates shall be selected so that the proportion of the total district delegates and alternates that are committed to each candidate or are uncommitted equals as nearly as possible the proportion of the popular vote cast in the presidential primary selection in that district for each candidate and for the uncommitted position with certain exceptions. Subsection 7 of Section 115.776 provides a comparable provision for the selection of at-large delegates and alternates. Subsection 8 of Section 115.776 sets forth the specific procedure to determine the number of delegates and alternates awarded to each candidate and as uncommitted delegates and alternates. Subsection 9 of Section 115.776 provides that the delegates and alternates shall be selected and allocated as provided in Section 115.776 with certain exceptions which are not relevant to your question.¹ There is no provision in Section 115.776 which indicates that Bob Dole, even though he has withdrawn as a candidate, is not to be awarded the delegates and alternates to which he is entitled based on the results of the presidential primary.

Section 115.780 addresses how long a delegate or alternate is bound to the candidate for whom he designated commitment. Upon the withdrawal of the candidate, the delegate or alternate is no longer bound to that candidate. This section contains no provision regarding the selection of delegates or alternates, but addresses the length of time the delegate or alternate is bound to a candidate.

Reading Section 115.776 and Section 115.780 together, we conclude that in accordance with Section 115.776, delegates committed to Bob Dole should be selected in accordance with the results of the presidential primary. Based on the information we have been provided, nineteen delegates who are committed to Bob Dole should be selected. After the selection of the nineteen delegates committed to Bob Dole, under the provisions of Section 115.780, those delegates selected as being committed to Bob Dole are no longer bound to vote for that candidate.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General

The Honorable Frank Bild

¹We have not reviewed the national committee rules that may apply to the selection and allocation of delegates and alternates. We have been informed that there are no national committee rules that apply to the matter about which you are concerned.

115.776. National convention delegates and alternates, selection.—1. The state party organization which is the state organization recognized by the national organization of that established political party shall, after the primary and before the national convention, conduct a series of caucuses culminating in congressional and state conventions. Delegates to the national conventions shall be chosen at the congressional district and state conventions pursuant to rules established by the political parties; provided, however, that rules so established require that national delegates "be pledged to support presidential candidates as provided by sections 115.123, 115.625, and 115.750 to 115.785. The delegates and alternates shall be selected as provided in this section; except that, if the rules of the national committee of the established political party are in conflict with the provisions of this section, then the national committee rules shall govern the selection of delegates where in conflict with this section.

2. Not less than three-fourths of the convention delegates from the state to the national convention shall be allocated equally to the state congressional districts. Those delegates not allotted to congressional districts must be allotted to the state as at-large delegates. Additional at-large delegates allocated to a state under national party rules shall not be included in the calculation of the proportion of the state's delegates allocated to congressional districts and at large.

3. Following the state presidential primary, anyone seeking to be selected as national convention delegate or alternate must designate whether or not he is committed, and, if committed, to which candidate he is committed.

4. To qualify as a delegate from a congressional district, a person must be a registered voter of the congressional district from which he seeks to be a delegate. To qualify as an at-large delegate, a person must be a registered voter of this state.

5. If a delegate or alternate dies, withdraws or becomes disqualified after he has been selected and before the national convention for which he is selected has begun, he shall be replaced by a qualified person committed to the same preference and selected by the party's congressional district committee or state committee, as the case may be.

6. Congressional district delegates and alternates shall be selected so that the proportion of the total district delegates and alternates that are committed to each candidate or are uncommitted equals as nearly as possible the proportion of the popular vote cast in the presidential primary selection in that district for each candidate and for the uncommitted position; except that votes for a candidate or for the uncommitted position which total less than fifteen percent of the district total shall be counted as uncommitted in determining proportions of district delegates awarded if the sum of all such votes exceeds fifteen percent of the district total.

7. At-large delegates and alternates shall be selected in numerical order from each state so that the proportion of the total at-large delegates and alternates that is uncommitted or committed to each candidate equals as nearly as possible the proportion of the popular vote for that established political party that was cast as uncommitted and for each candidate in the state at large; except that, votes for a candidate or uncommitted listing that total less than fifteen percent of the total shall be counted as uncommitted in determining proportions of district delegates awarded if the sum of all such votes exceeds fifteen percent of the state total.

8. In determining the number of delegates and alternates to be awarded to each candidate and as the uncommitted delegates and alternates, the percentage of the vote received by each candidate and the percentage of the uncommitted vote in each congressional district or the state at large, as the case may be, shall be multiplied by the total number of delegates allotted to the congressional district or the state at large, as the case may be. The product arrived at for each candidate or the uncommitted vote shall be rounded off to the nearest whole number to arrive at the number of delegates to be awarded to a particular candidate or the uncommitted vote. The percentage of the vote received by each candidate and for uncommitted shall be determined in accordance with the provisions of this section and shall not take into consideration the votes for any candidate or uncommitted listing that total less than fifteen percent of the district total or the state at large, as the case may be.

9. The delegates and alternates shall be selected and allocated as provided in this section; except that, if the rules of the national committee of the established political party are in conflict with the provisions of this section, then the national committee rules shall govern the selection and allocation of delegates where in conflict with this section.

115.780. Delegates bound for two ballots, exceptions—pledge requirements.—1. Each national convention delegate and alternate shall be bound to vote for the candidate for whom he designated commitment, if any, when he was selected as a delegate or alternate until that or another candidate received the party's nomination, two ballots have been taken or that candidate withdraws, suspends his campaign, releases his delegates, or receives less than fifteen percent of the votes cast on the first ballot, whichever first occurs.

2. Each delegate and alternate, within ten days after accepting selection as a delegate or alternate, shall file with the secretary of state his sworn pledge that he will abide by the provisions of sections 115.750 to 115.785.

3. If the rules of the national committee of an established political party prohibit any delegate from being bound to cast his or her vote for a candidate, then the provisions of the national committee rules shall govern.

CANDIDATES: Pursuant to Section 115.607.1,
COUNTY COMMITTEE: RSMo 1986, a candidate for
ELECTIONS: county committee who was not a
ELIGIBILITY OF CANDIDATE: registered voter for one year
QUALIFICATIONS OF CANDIDATE: prior to the date of the
election because said candidate
had not attained the age of eighteen years one year prior to the
date of the election is not a qualified candidate, and the
election authority has the authority to withhold said
candidate's name from the primary ballot.

May 18, 1988

OPINION NO. 111-88

Michael E. Reardon
Clay County Prosecuting Attorney
11 South Water
Liberty, Missouri 64068



Dear Mr. Reardon:

This opinion is in response to your questions asking:

First, does Section 115.607.1, RSMo 1986, apply to an otherwise qualified candidate for county committee who was not a registered voter of his county and committee district for more than one year prior to the date of his election solely because such candidate has not yet attained the age of eighteen? (The candidate became eighteen and a registered voter prior to the election but not for one year prior thereto). Second, does the county election authority, based upon its determination that such candidate is not qualified, have authority to withhold the candidate's name from the primary ballot in view of the procedures set forth in Section 115.526, RSMo 1986?

Section 115.607.1, RSMo 1986, provides:

1. No person shall be elected or shall serve as a member of a county committee who is not, for one year next before his election, both a registered voter of and a resi-

Michael E. Reardon

dent of the county and the committee district from which he is elected. . . .

The language used in statutes is to be given its plain and ordinary meaning. Bartley v. Special School District of St. Louis County, 649 S.W.2d 864, 867 (Mo. banc 1983). The plain and ordinary meaning of the above-quoted language is that the candidate in question is not qualified because he was not a registered voter for the required period of time before the election.

A review of the legislative history of subsection 1 supports this conclusion. When originally enacted in the Comprehensive Election Act of 1977, subsection 1 did not contain the one year requirement:

1. No person shall be elected as a member of a county committee who is not a registered voter of the county and a resident of the committee district from which he is elected. . . . Laws of Missouri 1977 H.B. 101 Section 14.010 p. 298.

The one year requirement was added by way of an amendment enacted in 1982 which changed the relevant provision of subsection 1 to appear as it does today. Laws of Missouri 1982 S.B. 526 p. 300. The fact that the language containing the one year requirement was added by amendment shows that the legislature intended a change from the original provision. O'Neil v. State, 662 S.W.2d 260, 262 (Mo. banc 1983).

It is presumed that the legislature, when enacting the above-referenced law, was aware that a person had to be at least eighteen years old to register to vote. In 1982, at the time of the amendment to Section 115.607.1, Article VIII, Section 2 of the Missouri Constitution (as adopted in 1974) and Section 115.133, RSMo contained the requirement a voter must be over the age of eighteen. The legislature is presumed to act with "full knowledge of existing statutes". City of Nevada v. Bastow, 328 S.W.2d 45, 49 (K.C. Ct. App. 1959). In fact, in the same session of the legislature which passed the amendment to Section 115.607.1 adding the one year requirement, the legislature also repealed and reenacted subsection 1 of Section 115.133 leaving the eighteen year old requirement intact. Laws of Missouri 1982 H.B. 1600 p. 308.

Michael E. Reardon

In view of the language of Section 115.607.1 and its legislative history, the candidate in question is not eligible to be a candidate for the county committee.

In regard to your second question, this office is of the opinion that the election authority does have the authority to withhold the name of the candidate in question from the primary ballot. Mansur v. Morris, 355 Mo. 424, 196 S.W.2d 287, 291-294 (Mo. banc 1946); State ex rel. Gralike v. Walsh, 483 S.W.2d 70, 74 (Mo. banc 1972); and Attorney General Opinion No. 87, Usrey, 1972, a copy of which is enclosed.

The enactment of Section 115.526, RSMo 1986, in 1982 (Laws of Missouri 1982 S.B. 526 p. 299) does not change this conclusion. Section 115.526 provides a specific procedure for one candidate to challenge another on eligibility issues before a primary or general election takes place. It does not remove the obligation from the election authority to follow the law when making decisions about placing names on ballots nor does it remove the authority of the election authority to carry out this obligation by refusing to place a name on the ballot. That obligation and the authority to enforce it have been firmly established by court decisions. In the Gralike case, the court held that it was justified in issuing a writ of prohibition against an election authority because the latter had exceeded its authority when, by proposing to place the name on the ballot of a candidate for state senator who did not meet the residency requirements, the election authority was not following the law establishing those requirements. Id. at 74, citing State ex rel. Bates v. Remmers, 325 Mo. 1175, 30 S.W.2d 609, 612 (Banc 1930), which held that for an election authority to place the name of an ineligible candidate on the ballot is "to exceed their legal power and jurisdiction".

The legislature is presumed to be aware of existing declarations of law by the Supreme Court when it enacts law on the same subject. State ex rel. Missey v. City of Cabool, 441 S.W.2d 35, 41 (Mo. 1969). Nothing in the language of Section 115.526 either expressly or by implication removes from the election authority the authority to withhold the name of an ineligible candidate from the ballot.

Michael E. Reardon

CONCLUSION

It is the opinion of this office that pursuant to Section 115.607.1, RSMo 1986, a candidate for county committee who was not a registered voter for one year prior to the date of the election because said candidate had not attained the age of eighteen years one year prior to the date of the election is not a qualified candidate, and the election authority has the authority to withhold said candidate's name from the primary ballot.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

Enclosure:

Attorney General Opinion No. 87, Usrey, 1972



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 731-3321

June 30, 1988

OPINION LETTER NO. 113-88

Richard Rice, Director
Department of Public Safety
Post Office Box 749
Jefferson City, Missouri 65102

Dear Mr. Rice:

This opinion letter is in response to your questions regarding the construction of Section 304.013.2, as enacted by Conference Committee Substitute #2 for House Committee Substitute for House Bill No. 990, 84th General Assembly, Second Regular Session. This bill was signed by the Governor on April 19, 1988. Section 304.013.2 provides:

2. No person shall operate an off-road vehicle within any stream or river in this state, except that off-road vehicles may be operated within waterways which flow within the boundaries of land which an off-road vehicle operator owns or has permission to be upon.

As stated in your request, there are two common scenarios which require the application of Section 304.013.2. "First is the situation where a landowner owns property on both sides of the waterway and two of his four property lines cross the waterway. This factual situation is illustrated as follows: (See attached illustration #1)." Your first question asks:

May a person with the landowner's permission operate an off-road vehicle in the waterway other than that portion of the waterway contained within the boundaries of land owned by the landowner?

"The second factual circumstance arises where the landowner owns property on only one side of the waterway. This may be illustrated as follows: (See attached illustration #2)." Your second question asks:

Richard Rice

May a person with the landowner's permission operate an off-road vehicle in the waterway? If so, may a person with the landowner's permission operate an off-road vehicle across the entire waterway, or is the person with the landowner's permission limited to only a portion of the waterway?

In order to answer the questions posed, it must be determined who owns the bed of the watercourse. However, before the bed title can be determined one must classify a river, stream or lake as "navigable" or "non-navigable". Title to the beds of rivers and lakes which were "navigable" at the time of statehood passed to the state of Missouri. Bed title to rivers, streams and lakes which were "non-navigable" at the date Missouri was admitted to the Union remained in the federal government or in the grantee of a federal land patent. United States v. Utah, 283 U.S. 64, 75; 51 S.Ct. 438, 440; 75 L.Ed. 844, 849 (1931).

Rivers, streams or lakes are navigable under the federal definition if they are "susceptible of being used, in their ordinary condition, as highways for commerce, . . . when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried . . ." The Daniel Ball, 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999, 1001 (1871). For the purpose of bed title, a watercourse is not federally navigable if it can only be made navigable by "reasonable improvements." See Davis, State Ownership of Beds of Inland Waters - A Summary and Reexamination, 57 Neb. L. Rev. 665, 670 (1978).

When Missouri courts have been asked to classify a river as navigable or non-navigable, courts have consistently applied the federal definition. See Slovensky v. O'Reilly, 233 S.W. 478, 481 (Mo. 1921). Missouri has narrowly interpreted navigable waters to be those rivers which are susceptible to use by larger vessels and not those rivers or streams which may only be navigated by canoes, rowboats, and other small floating craft. Elder v. Delcour, 269 S.W.2d 17, 23 (Mo. banc 1954). The Mississippi River and Missouri River have been found to be navigable and therefore, bed title is vested in the State of Missouri. For a list of Missouri's rivers and streams which have been judicially classified as navigable or non-navigable, see Missouri Attorney General Opinion Letter No. 264, Reid, 1971, a copy of which is enclosed.

It is well settled that "where a government patent conveyed land adjacent to a non-navigable river . . . , the patent conveyed all the land between the meander line on shore and the middle thread of the river . . . in the absence of an express

Richard Rice

reservation or the existence of a previous patent or survey" which conveyed the bed title to a third party. Elder, 269 S.W.2d at 23. On the other hand, if a riparian landowner owns the land on both sides of the river, such landowner owns the bed of the non-navigable river. Id. Therefore, in reference to illustration #1, the landowner owns the entire bed of the waterway within the boundary lines of his property. The landowner in illustration #2 owns only to the middle thread of the waterway adjacent to his property. We assume the waterway shown in each illustration is one which would be classified as non-navigable.

Section 304.013.2 limits the operation of off-road vehicles to areas "within waterways which flow within the boundaries of land which an off-road vehicle operator owns or has permission to be upon." Hence, an off-road vehicle operator who is the landowner or has the permission of the landowner depicted in illustration #1 may operate the vehicle over the bed of the entire waterway within the boundary lines of the property. An off-road vehicle operator who is the landowner or has the permission of the landowner depicted in illustration #2 may only operate the vehicle to the center line of the waterway adjacent to the property. Under neither illustration may an off-road vehicle be operated up or down stream beyond the imaginary property lines shown on the illustration.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

Enclosure

Opinion Letter No. 264, Reid, 1971

ILLUSTRATION #1

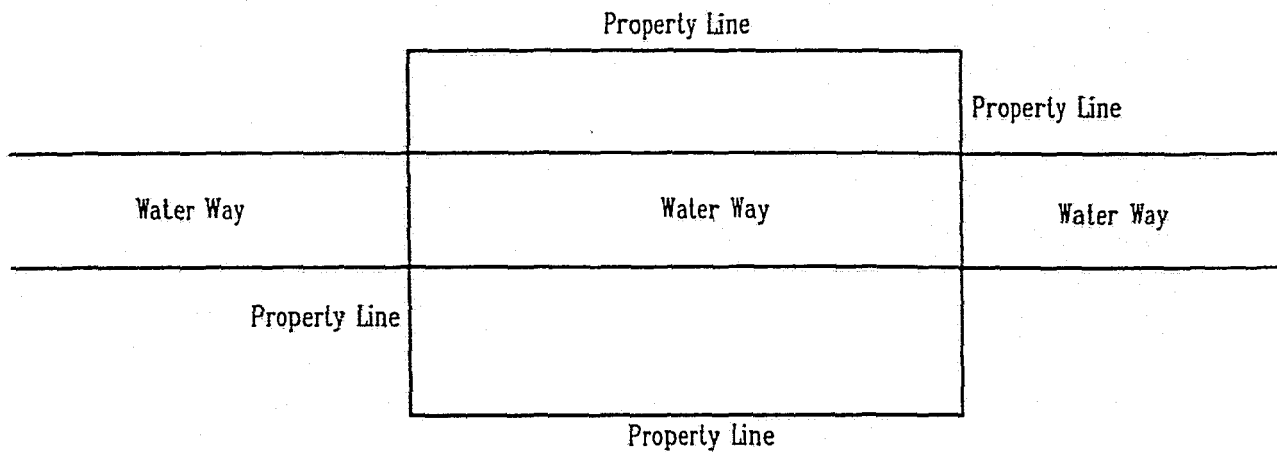
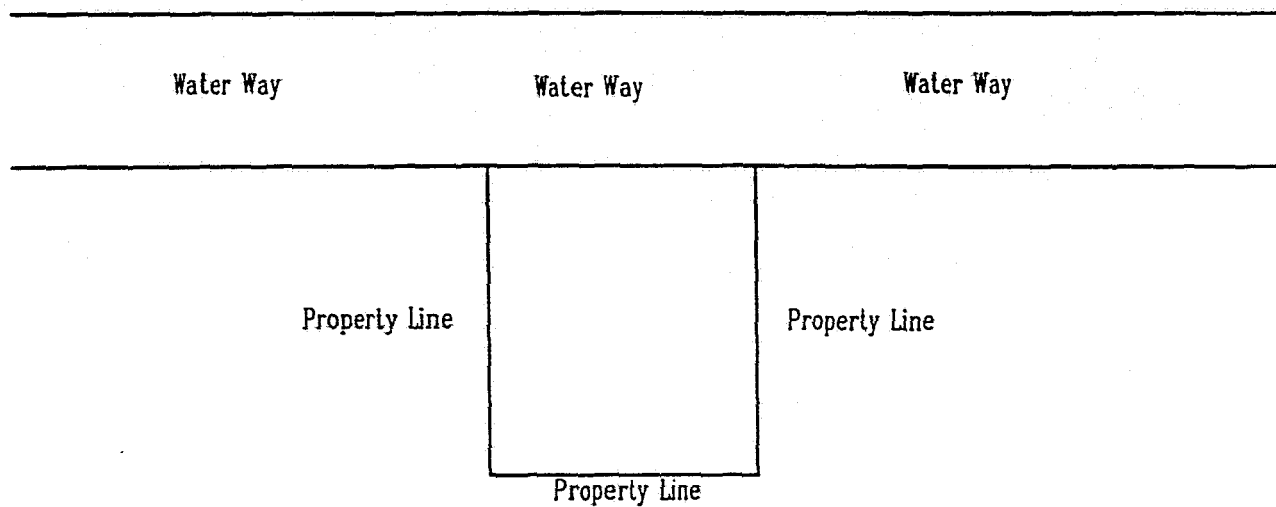


ILLUSTRATION #2



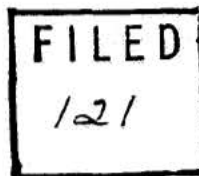
CITIES, TOWNS AND VILLAGES:
CITY OFFICERS-OFFICIALS:
CONFLICT OF INTEREST:
COUNTIES:
COUNTY COMMISSIONS:
COUNTY COMMISSIONERS:
INCOMPATIBILITY OF OFFICES:

The same person may not simultaneously hold both the office of presiding commissioner of a third class county and the office of alderman of a fourth class city within that county.

June 7, 1988

OPINION NO. 121-88

The Honorable Norman L. Merrell
Senator, District 18
State Capitol Building, Room 423
Jefferson City, Missouri 65101



Dear Senator Merrell:

This opinion is in response to your question asking:

May the Presiding Commissioner of Scotland County simultaneously hold the position of an elected alderman of Memphis, Missouri?

It is our understanding Scotland County is a third class county and Memphis, the county seat, is a fourth class city.

We have found no statute or constitutional provision prohibiting the same person from holding these offices simultaneously. However, we have also examined the common law doctrine prohibiting a public officer from holding two incompatible offices. The principles of that doctrine have been set forth by Missouri courts as follows:

At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two, -- some conflict in the duties required of the officers, as where one has some supervision of the others, is required to deal with, control, or assist him. It was said by Judge Folger (People v. Green, 58 N.Y. 295): "Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that 'incompatibility' from which the law declares that

the acceptance of the one is the vacation of the other. The force of the word in its application to this matter is that, from the nature and relations to each other of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one towards the incumbent of the other. . . ." State ex rel. Walker v. Bus, 135 Mo. 325, 36 S.W. 636, 639 (1896).

The respective functions and duties of the particular offices and their exercise with a view to the public interest furnish the basis of determination in each case. Cases have turned on the question whether such duties are inconsistent, antagonistic, repugnant or conflicting as where, for example, one office is subordinate or accountable to the other. State ex rel. McGaughey v. Grayston, 349 Mo. 700, 163 S.W.2d 335, 339-340 (banc 1942).

Applying these principles, this office has previously opined that the offices of the presiding commissioner of a third class county and the mayor of a fourth class city are incompatible. Opinion Letter No. 64, Foley, 1976, a copy of which is enclosed. In that opinion, this office stated that there were many statutes which would bring the two offices into conflicts of authority and cited as examples Section 70.210, et seq., RSMo, permitting cooperative agreements between counties and cities; Section 71.300, RSMo, authorizing cooperation in the maintenance of jails between counties and cities; and Section 71.340, RSMo, authorizing cities to make certain appropriations for roads leading to and from such cities.

In regard to the offices presented in your question, we reach the same conclusion and for the same reasons. The board of aldermen participates in the governance of the city in such a manner and to such a degree that the potential for conflict with the county's governing body is as likely as in the case of the offices concerned in Opinion Letter No. 64, Foley, 1976. Besides the statutes cited in that opinion as presenting areas of conflict, see also Sections 71.012 and 79.020, RSMo 1986, concerning the annexation by a fourth class city of unincorporated land in the county and Section 88.703, RSMo 1986, concerning liability of county property within a fourth class city for its proportionate part of the city's public improvements.

In situations in which a public officer is holding two incompatible offices, the public may become concerned about the

validity of his official acts. The courts have protected the public and third persons from the disruption which would be caused by his official acts being held invalid. As the court explained in In Re F. C., 484 S.W.2d 21, 24 (Mo.App. 1972):

"The rule at common law is well settled that where one, while occupying a public office, accepts another, which is incompatible with it, the first will ipso facto terminate without judicial proceeding or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first . . . This rule it is said, is founded upon the plainest principles of public policy, and has obtained from very earliest times . . . (T)he law presumes the officer did not intend to commit the unlawful act of holding both offices, and a surrender of the first is implied." State ex rel. Walker v. Bus, Mo. banc, 135 Mo. 325, 36 S.W. 636, 637[1]; State ex rel. Owens v. Draper, 45 Mo. 355. This rule still obtains and "has never been questioned". State ex rel. McGaughey v. Grayston, Mo. banc, 349 Mo. 700, 163 S.W.2d 335, 339[10] . . . the surrender of the first office which is implied in the common law rule does not invalidate the acts of the occupant of the first office so far as third persons and the public are concerned, but that occupant becomes a ³ de facto officer until ousted by proper process.

³Habeas corpus is not the proper method to test the official conduct of a de facto public officer. "(T)itle to a public office or the right of a de facto officer to exercise the rights and duties of the office cannot be tested except by the state in a direct proceeding for that purpose and the authority to institute quo warranto proceedings rests within the discretion of the officers named in Sec. 531.010, RSMo VAMS." Boggess v. Pence, Mo. banc, 321 S.W.2d 667, 671[1]; Civil Rule 98.01, V.A.M.R.; State v. King, Mo., 379 S.W.2d 522, 525 [4,5]; State ex rel. McGaughey v. Grayston, Mo. banc, 349 Mo. 700, 163 S.W.2d 335, 340 [14,15].

The Honorable Norman L. Merrell

Conclusion

It is the opinion of this office that the same person may not simultaneously hold both the office of presiding commissioner of a third class county and the office of alderman of a fourth class city within that county.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

Enclosure:

Attorney General Opinion Letter No. 64, Foley, 1976



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

May 16, 1988

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 889
(314) 751-3321

OPINION LETTER NO. 124-88

The Honorable Roy D. Blunt
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Secretary Blunt:

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo 1986, for sufficiency as to form of an initiative petition relating to the amendment of the Missouri Constitution by adopting a new article thereto, to be known as Article XIV and entitled "Health Care." A copy of the initiative petition and the proposed amendment are attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. See Moore v. Brown, 165 S.W.2d 657 (Mo. banc 1942). Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General

Enclosure

It is a class A misdemeanor for anyone to sign any initiative petition with any name other than his own, or knowingly to sign his name more than once for the same measure for the same election, or to sign a petition when he knows he is not a registered voter.

INITIATIVE PETITION

To the Honorable Roy D. Blunt, Secretary of State for the state of Missouri:

We, the undersigned, registered voters of the state of Missouri and _____ county (or "city of St. Louis"), respectfully order that the following proposed amendment to the Constitution shall be submitted to the voters of the state of Missouri, for their approval or rejection, at the general election to be held on the 8th day of November, 1988, and each for himself says: "I have personally signed this petition; I am a registered voter of the state of Missouri and _____ county (or "city of St. Louis"); my registered voting address and the name of the city, town or village in which I live are correctly written after my name.

CIRCULATOR'S AFFIDAVIT, STATE OF MISSOURI, COUNTY (where being notarized) OF _____.

I, (Petitioner print your name here) _____, a Missouri registered voter and resident of the state of Missouri, being first duly sworn, say

NAME (Signature)	DATE SIGNED	REGIS. VOTING ADDRESS (Street) (City, Town or Village)	ZIP CODE	CONG. DIST.	PRINT YOUR NAME (Printed or Typed)
1. _____					
2. _____					
3. _____					
4. _____					
5. _____					
6. _____					
7. _____					
8. _____					
9. _____					
10. _____					
11. _____					
12. _____					
13. _____					
14. _____					
15. _____					
16. _____					
17. _____					
18. _____					
19. _____					
20. _____					

signed this page of the foregoing petition, and each of them signed his name thereto in my presence; I believe that each has stated his name, registered voting address and city, town or village correctly, and that each signer is a registered voter of the State of Missouri and _____ county (or "city of St. Louis").

Signature of affiant (Person obtaining signatures)

Street address of affiant (where registered to vote)

Subscribed and sworn to before me this _____ day of _____, A.D., 1988

Signature of Notary Public

City, state and zip code of affiant

My commission expires _____
(Use notary stamp here, if available)

THE PROPOSED AMENDMENT

Shall the Constitution of Missouri be amended by adding a new Article entitled "Health Care," creating a trust fund to provide health care coverage to persons suffering from catastrophic or high-risk illnesses, assist certain elderly persons with Medicare premiums, provide health insurance coverage to certain uninsured persons, and expand coverage under the state's medical assistance program to persons not presently covered thereunder; establishing an earnings tax of six-tenths of one percent to provide funds for the trust and limiting expenditures of state funds to provide coverage under the trust to funds raised by such tax and interest thereon?

BE IT RESOLVED BY THE PEOPLE OF THE STATE OF MISSOURI THAT THE CONSTITUTION BE AMENDED:

The Constitution of Missouri is amended by adding a new Article thereto, to be known as Article XIV and entitled "Health Care".

Section 1. There is hereby established a Missouri health care trust fund. The trust shall provide health care coverage to persons specified herein. No taxes or funding scheme other than the tax imposed by section 11 of this article, the interest thereon, and participant contributions shall be imposed or used by the general assembly or the board of directors of the trust to provide health care coverage by or through the trust. The trust shall provide health care coverage for catastrophic and high-risk illnesses to persons as provided for by sections 14 and 15 of this article. The trust shall also provide health care coverage to: (a) uninsured persons who are unemployed and unable to qualify for or afford continuation of medical insurance coverage benefits, and dependents of such persons; (b) qualified medicare beneficiaries for whom the state may elect to make medical assistance available to pay for medicare cost-sharing obligations; (c) persons who are uninsured, whose household income is not more than one-hundred fifty percent of the poverty level and who meet resource limits to be established by law; (d) qualified pregnant women and children in households with incomes below an amount as defined by law; (e) qualified disabled children between the ages of five and seventeen; (f) qualified persons eligible to receive benefits under the medical assistance program under the eligibility criteria in effect therefor on the effective date of this section, but for the fact that they fail to meet the resource criteria due to ownership of a home; and (g) such other qualified categories of persons to which the general assembly elects to provide benefits pursuant to this article. As used in this section, "qualified" means persons to whom the state may elect to provide benefits under its medical assistance program and for whom, in such event, the federal government will provide financial participation to the state pursuant to the federal medicare statute or under any other federal program providing financing for health care coverage.

Section 2. To the full extent that the coverage may be provided to persons specified in subparagraphs (a) through (g) of section 1 of this article by revising the eligibility criteria for participation in the medical assistance program so as to expand the coverage thereof, including establishment of a medically needy program to extend medical assistance benefits to all persons with incomes of no more than one-hundred thirty-three percent of the payment standard established by the state for purposes of its aid to families with dependent children program who meet all non-financial eligibility requirements for participation in the medical assistance program, except receipt of cash assistance payments under a state or federal program, such coverage shall be provided in such manner. Provided, however, that this article shall not require that cash assistance benefits be made available to any person or category of persons. The state's cost of expanding the medical assistance program as mandated by this section shall be paid from the trust. In no event shall the eligibility guidelines for the medical assistance program be revised pursuant to this section to make eligible for benefits thereunder any person for whom the federal government will not provide financial participation.

Section 3. Coverage shall also be made available to persons specified in subparagraphs (a) through (c) of section 1 of this article who are not eligible to receive benefits under the medical assistance program through a program of health care coverage funded solely by funds from the Missouri health care trust fund including premiums which shall be paid by covered persons or by a political subdivision on behalf of covered persons, as provided in section 7 of this article.

Section 4. The trust shall be administered by a board of directors appointed by the governor with the advice and consent of the senate. The number and qualifications of directors shall be as provided by law, however one-third of the membership of the board of directors, but no more than one-third thereof, shall consist of health care providers, or persons employed by health care providers, or associations representing health care providers. The majority of the remaining members of the board shall be persons involved in the purchase or provision of medical insurance, or other health care coverage, for a minimum of twenty-five persons. The board shall, in addition to the powers conferred to it under the provisions of this article, have such other powers and duties as provided by law.

Section 5. Eligibility criteria, benefits, contributions, premiums, copayments, deductibles, reimbursements, and quality and utilization controls shall be established by the board of directors. The trust shall provide coverage for all health care services for which health care providers are reimbursed under the medical assistance program and shall not provide coverage for any other services. Reimbursement for services provided under this article to persons who do not qualify for federal financial participation, shall be made to providers at the same rate at which reimbursement is made to providers for the same services by the medical assistance program, unless otherwise provided by this article. Providers shall accept reimbursement under the benefit plan established pursuant to this article as payment in full for services for which such reimbursement is made. As used in this section, "reimbursement" includes any amount which eligible persons may be required to pay as a copayment or deductible under any benefit plan established by the board of directors pursuant to this article. Only providers participating in the medical assistance program shall be eligible to receive reimbursements from the trust.

Section 6. Persons with incomes of not more than one-hundred thirty-three percent of the payment standard established by the state for purposes of administering the aid to families with dependent children program, but who do not meet eligibility criteria for receipt of benefits from the medical assistance program, shall receive health care coverage under this section without payment of premiums, contributions, copayments or other deductibles, other than such copayments or deductibles paid by beneficiaries of the medical assistance program. Premiums, contributions,

copayments and deductibles to be paid by or on behalf of other persons qualified to receive coverage under the trust shall be calculated according to a progressive schedule of assessment based on such person's income as a percentage of the poverty level, with persons having an income of one-hundred and fifty percent of the poverty level paying one-hundred percent of the average cost of coverage under the trust and persons having an income of one-hundred percent of the poverty level paying fifty percent of such average cost. Such assessment schedule shall be promulgated by the board of directors so as to assure the actuarial soundness of the trust.

Section 7. Any political subdivision may elect to pay premiums, copayments, or deductibles for its eligible residents and the general assembly shall enact legislation to allow political subdivisions the option of either individually or collectively enrolling such residents for coverage by the trust. If a political subdivision pays premiums for its residents, it may require that such residents participate in a capitation or managed care program chosen by the political subdivision and approved by the board of directors.

Section 8. The board of directors shall ensure that the benefit plan for the health care coverage program established pursuant to this article is actuarially sound based on projected funding levels, is consistent with the state plan for medical assistance, and is within the limits of the funds provided by the general assembly for the operation of the trust, including such participant contributions which the board of directors may establish. The board shall, prior to the beginning of each fiscal year, review the benefit plan and adjust premium rates and copayment and deductible requirements so as to assure that the plan is actuarially sound based on projected funding levels and that it will operate within the limits of the funds provided by the general assembly, including participant contributions. Notwithstanding any other provision of this article, should the board determine during the course of a fiscal year that the funds available to the trust are insufficient to allow the benefit plan to operate within the limits of the funds available to the trust, the board may increase the amount which persons receiving coverage under the trust are required to pay as copayments or deductibles and/or reduce reimbursements to health care providers for services, provided that the board gives providers a minimum of thirty days notice prior to reducing reimbursements. However, the board may not reduce reimbursements for services provided to persons receiving health care coverage under the medical assistance program nor may it increase copayments or deductibles applicable to such persons or to persons whose household income is less than one-hundred-thirty-three percent of the payment standard established by the state for purposes of administering its aid to families with dependent children program. If the board reduces reimbursements made to providers, pursuant to the provisions of this section, it shall adjust premium rates and/or copayment and deductible requirements effective at the beginning of the following fiscal year, so that, based on the actuarial projections available to the board, the trust will be able to make reimbursement to providers at the same rate at which the medical assistance program makes reimbursement to providers for the same services.

Section 9. No provider who is required to file a medicare cost report with the federal government for reimbursement purposes shall be required to submit such report to the board if it has submitted such report to another state agency. Where such reports have been submitted to another state agency, such agency shall make a copy of the report available to the board. Providers shall submit claims for payment to the trust on the same form used to submit such claims under the federal medicare program. The board may analyze the data contained in the medicare cost report together with the utilization and charge data recorded on uniform billing documents submitted to the trust for payment by providers. The general assembly may by law require health care providers to submit such additional information to the board of directors as it deems appropriate to ensure proper administration of the trust.

Section 10. The general assembly shall establish by law a method of calculating a person's income for purposes of this article. Such method shall not be more restrictive than the method used by the state for calculating a person's income for purposes of determining initial eligibility for the aid to families with dependent children program. As used in this article, "poverty level" means the federal non-farm poverty level as established annually by the Bureau of Labor Statistics of the federal Department of Labor or its successor agency.

Section 11. (1) To provide funds for the health care trust fund, there is hereby imposed, effective April 15, 1989, an earnings tax of six-tenths of one percent on the salaries, wages, commissions and other compensation earned by residents of the state; on the salaries, wages, commissions and other compensation earned by non-residents of the state for work done or services performed or rendered in the state; on the net profits of associations, business or other activities conducted by residents of the state; on the net profits of associations, business or other activities conducted in the state by non-residents; and on the net profits earned by all corporations as the result of work done or services performed or rendered and business or other activities conducted in the state.

(2) As used in this section:

(a) "Association" means a partnership, limited partnership, or any other form of unincorporated business or enterprise, owned by two or more persons.

(b) "Business" means an enterprise, activity, profession, trade or undertaking of any nature conducted for profit or ordinarily conducted for profit, whether by an individual, association, or other entity other than a corporation.

(c) "Corporation" means a corporation or joint stock association organized under the laws of the United States, this state, or any other state, territory, or foreign country or dependency, except for those corporations or organizations which are exempt from taxation under the state income tax code.

(d) "Employer" means an individual, association, corporation

(including a corporation not for profit), governmental administration, agency, arm, authority, board, body, bureau, department, division, subdivision, section or unit, or any other entity, that employs one or more persons on a salary, wage, commission, or other compensation basis, whether or not such employer is engaged in business.

(e) "Net Profits" means the net income of any individual, association, business, or corporation remaining after deducting from the gross profits or earnings the necessary expenses of operation exclusive of payments of federal and state income taxes.

(f) "Non-resident" means an individual, association, business, corporation, fiduciary or other entity domiciled outside the state.

(g) "Person" means every natural person, association, business or fiduciary.

(h) "Resident" means an individual, association, business, corporation, fiduciary or other entity domiciled within the state.

(i) "Taxpayer" means a person, whether an individual, association, business, corporation, fiduciary, or other entity required by this section to file a return of earnings or net profits, or to pay a tax thereon.

(3.) Unless another method of allocation is provided by the general assembly, the earnings of individuals and the net profits of businesses attributable to work done or business conducted partly within the state and partly outside of the state shall be allocated to the state in the same manner as is income for purposes of the state income tax.

(4.) The tax hereby imposed shall be collected and administered by the director of revenue. The general assembly shall enact laws pertaining to the collection and administration of such tax. The director of revenue may promulgate rules and regulations consistent with such laws and this section pertaining to such tax. The tax hereby imposed shall be payable on or before the fifteenth day of the fourth month following the close of the taxpayer's fiscal year. The department of revenue shall prepare appropriate returns. All employers maintaining an office or transacting any business within this state shall deduct and withhold from the wages of their employees the tax imposed by the section. Every employer withholding any amount from the wages of an employee shall, for each calendar quarter, file a withholding return as prescribed by the director of revenue and pay over to the director of revenue the taxes so withheld.

(5.) The general assembly shall, by law, provide for a credit against the tax imposed by this section to employers who provide medical insurance, or other health care coverage, meeting minimal standards, as defined by law, to their employees. The general assembly shall provide that the credit shall be calculated based upon a graduated scale, so that employers who provide the most comprehensive health care coverage shall be entitled to a credit in the amount of the tax due and employers providing less comprehensive coverage shall receive a lesser credit. The general assembly may provide by law for a penalty to be imposed on employers who reduce or eliminate health insurance coverage for their employees solely for the purpose of causing such employees to be eligible for coverage under the benefit plan established pursuant to the provision of this article.

(6.) The general assembly shall by law provide civil and criminal penalties for the failure to pay the tax hereby imposed, late payment thereof, failure to make a timely or correct return thereof, and failure to withhold any such tax as required by law. Until the effective date of such law, the penalties provided by law for like violations or delinquencies with respect to the state income tax shall be applicable to such violations or delinquencies with respect to the tax hereby imposed.

Section 12. Any provision of law to the contrary notwithstanding, all funds and tax revenues collected pursuant to the provisions of this article and all participant contributions shall be deposited in the State Treasury to the credit of the "Missouri Health Care Trust Fund" which is hereby established in the office of the state treasurer and shall be used only for the purpose of providing health care coverage pursuant to the provisions of this article and no other. Interest and other income derived from the investment of funds collected pursuant to this article shall be credited to the same account for the purposes provided in this article. The general assembly shall appropriate to the trust for each year an amount equal to the revenue raised pursuant to this article, together with the interest thereon. The general assembly shall appropriate sufficient funds from the trust for administration thereof so as to make coverage under the trust available to all persons eligible to receive such coverage.

Section 13. The general assembly shall appropriate twenty-two percent of the annual revenues raised by the tax provided for by section 11 of this article to enhance reimbursements made to health care providers under the medical assistance program and to expand the list of prescription medications for which reimbursement is provided under the medical assistance program's pharmaceutical formulary as of the effective date of this article.

Section 14. There is hereby established a "catastrophic illness pool" within the health care trust fund. The general assembly shall appropriate an amount not to exceed eighteen percent of the annual revenues raised by the tax provided for by section 11 of this article to fund the catastrophic illness pool.

Section 15. There is hereby established a "high-risk illness pool" within the health care trust fund. The general assembly shall appropriate an amount not to exceed two percent of the annual revenues raised by the tax provided for by section 11 of this article to fund the high-risk illness pool. Such pool shall provide coverage to persons unable to purchase medical insurance due to their medical history or that of their family. Persons eligible to participate in the pool shall pay premiums of not less than one hundred and fifty percent nor more than two hundred percent of the standard risk rate. Such premiums shall be established by the board of directors

Section 16. Payment of expenses and charges pursuant to this article to any person is not the granting of public money or property or the giving, spending, granting or pledging of public credit to a private person within the meaning of any section of this constitution. Revenues from any tax imposed pursuant to this article shall not be a part of "total state revenues" or "state revenues" within the meaning of section 18 of article X or section 3(b) of article IX of this constitution and the expenditure of such revenue shall not be an "expense of state government" within the meaning of section 20 or article X of this constitution.

Section 17. The board may contract with any entity for administration of coverage under the trust.

Section 18. Moneys in the trust fund shall be available to provide health care for covered persons in addition to and not in lieu of other moneys appropriated from general revenue by the general assembly for the provision of health care under any state or federal program existing on the effective date of this article. Revenues raised under the provisions of this article shall not be used to provide or pay for health care services, other than to increase reimbursements as provided in section 13, for persons who would qualify to receive benefits from the medical assistance program if the eligibility criteria in effect on the effective date of this section were applied to them, unless such persons become ineligible to receive benefits from the medical assistance program because the eligibility criteria imposed by the federal government for participation in the medicaid program or related cash assistance programs are made more restrictive than those imposed by the state on that date.

Section 19. If the state increases the aid to families with dependent children payment standard above the standard in effect on January 1, 1989, as measured as a percentage of the poverty level, the general assembly may by law require the trust to pay the state's share of the cost of providing medical assistance benefits to any additional persons who qualify to receive such benefits as a result of such increase.

Section 20. Should the federal government establish a national health care plan which provides health care coverage similar to that provided by this article, or abolish or replace the existing medicaid program, the general assembly shall eliminate any coverage hereunder which duplicates any federal coverage and may use the revenues raised by this article to: (a) provide a state match or to pay any premiums, copayments, or deductibles or any other contribution required for residents of the state to participate in any federal plan, or (b) to otherwise provide health care coverage to persons provided coverage by this article. In the event of either of the occurrences set out above, the general assembly shall have the authority to redistribute the revenues raised by this article to provide health care services to persons provided health care coverage under this article or to increase reimbursements under the medical assistance program, regardless of any other provisions of this article.

Notice: You are advised that the proposed constitutional amendment changes, repeals, or modifies by implication, or may be construed to change, repeal, or modify by implication, in addition to the provisions of the Constitution which are specifically added, the following provisions of the Constitution of Missouri: Article III, sections 36 and 38(a); Article IV, Section 27; Article IX, Section 3(b); and Article X, Sections 3, 17, 18, 19, and 20.



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

May 20, 1988

OPINION LETTER NO. 128-88

The Honorable Roy D. Blunt
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Secretary Blunt:

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo 1986, for sufficiency as to form of an initiative petition relating to the amendment of Article IV, Section 30(a) of the Missouri Constitution. A copy of the initiative petition and the proposed amendment which you submitted to this office are attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. See Moore v. Brown, 165 S.W.2d 657 (Mo. banc 1942). Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General

Enclosure

It is a class A misdemeanor for anyone to sign any initiative petition with any name other than his own, or knowingly to sign his name more than once for the same measure for the same election, or to sign a petition when he knows he is not a registered voter.

INITIATIVE PETITION

To the Honorable Roy D. Blunt, Secretary of State for the state of Missouri:

We the undersigned, registered voters of the state of Missouri and of _____ County (or city of St. Louis), respectfully order that the following proposed amendment to the constitution shall be submitted to the voters of the state of Missouri, for their approval or rejection, at the general election to be held on the 8th day of November, 1988, and each for himself says: I have personally signed this petition; I am a registered voter of the state of Missouri and _____ County (or city of St. Louis); my registered voting address and the name of the city, town or village in which I live are correctly written after my name.

CIRCULATOR'S AFFIDAVIT

STATE OF MISSOURI
COUNTY OF _____

I, _____, a Missouri registered voter and a resident of the state of Missouri, being first duly sworn, say (print or type names of signers)

	Name (Signature)	DATE SIGNED	REGISTERED VOTING ADDRESS		ZIP CODE	CONGR. DIST.	NAME (Printed or typed)
			(Street) Town or Village	(City, Town or Village)			
1.	_____	____/____/____	_____	_____	_____	_____	_____
2.	_____	____/____/____	_____	_____	_____	_____	_____
3.	_____	____/____/____	_____	_____	_____	_____	_____
4.	_____	____/____/____	_____	_____	_____	_____	_____
5.	_____	____/____/____	_____	_____	_____	_____	_____
6.	_____	____/____/____	_____	_____	_____	_____	_____
7.	_____	____/____/____	_____	_____	_____	_____	_____
8.	_____	____/____/____	_____	_____	_____	_____	_____
9.	_____	____/____/____	_____	_____	_____	_____	_____
10.	_____	____/____/____	_____	_____	_____	_____	_____
11.	_____	____/____/____	_____	_____	_____	_____	_____
12.	_____	____/____/____	_____	_____	_____	_____	_____
13.	_____	____/____/____	_____	_____	_____	_____	_____
14.	_____	____/____/____	_____	_____	_____	_____	_____
15.	_____	____/____/____	_____	_____	_____	_____	_____
16.	_____	____/____/____	_____	_____	_____	_____	_____
17.	_____	____/____/____	_____	_____	_____	_____	_____
18.	_____	____/____/____	_____	_____	_____	_____	_____
19.	_____	____/____/____	_____	_____	_____	_____	_____
20.	_____	____/____/____	_____	_____	_____	_____	_____

signed this page of the foregoing petition, and each of them signed his name thereto in my presence; I believe that each has stated his name, registered voting address and city, town or village correctly, and that each signer is a registered voter of the state of Missouri and _____ County.

Signature of Affiant
(Person obtaining signatures)

Address of Affiant

Subscribed and sworn to before me this _____ day of _____, A.D., 19__.

Signature of Notary

Notary Public (Seal)

My commission expires _____.

Constitutional Amendment to adjust the allocation of Funds to the County Aid Road Trust Fund to fifteen percent and to allocate to counties defined in Section 31 of Article VI of the Missouri Constitution a percentage of the increase in the Motor Fuel Tax which became effective after May 31, 1987.

CONSTITUTIONAL AMENDMENT

BE IT RESOLVED by the People of the State of Missouri that the Constitution be amended:

That at the next general election to be held in the state of Missouri, on Tuesday next following the first Monday in November, 1988, or at a special election to be called by the Governor for that purpose, that hereby submitted to the qualified voters of this state for adoption or rejection, the following amendment to article IV of the Constitution of the State of Missouri:

Section A. Section 30(a), article IV, Constitution of Missouri, is repealed and one new section adopted in lieu thereof, to be known as section 30(a), to read as follows:

Section 30(a). 1. On and after the first day of the month next following the adoption of this section, a tax upon or measured by fuel used for propelling highway motor vehicles shall be levied and collected as provided by law. Any amount of the tax collected with respect to fuel not used for propelling highway motor vehicles shall be refunded by the state in the manner provided by law. The remaining net proceeds of the tax, after deducting costs of collection, apportionment and making refunds, shall be apportioned between the counties, cities and the state as hereinafter provided and shall stand appropriated without legislative action for the following purposes:

(1) Fifteen Percent (15%) of the remaining net proceeds shall be deposited in a special trust fund known as the "County Aid Road Trust Fund" which shall be credited to the various counties of the state on the following basis: One-half on the ratio that the county road mileage of each county bears to the county road mileage of the entire state as determined by the last available report of the state highways and transportation commission and one-half on the ratio that the rural land valuation of each county bears to the rural land valuation of the entire state as determined by the last available report of the state tax commission, except that county road mileage in incorporated villages, towns or cities in the land valuation in incorporated villages, towns or cities shall be excluded

in such determination, except that, if the assessed valuation of rural lands in any county is less than five million dollars, the county shall be treated as having an assessed valuation of five million dollars provided however, that out of the net proceeds resulting from any increase in the rate of the motor fuel tax which became effective after May 31, 1987, there shall

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RECEIVED

Ray D. Blount

article V of the Missouri Constitution, an amount equal to four percent of the county aid road trust fund; provided further however, the four percent shall not apply to those funds allocated to the county aid road trust fund as a result of the percentage in effect prior to June 1, 1987. The funds credited to each county shall be used by the county solely for the construction, reconstruction, maintenance and repairs of roads, bridges and highways, and subject to such other provisions and restrictions as provided by law. In the absence of other controls provided by law, the state highways and transportation commission shall prescribe policy, rules and requirement for the expenditure of these funds by counties, including, among other things, highways and transportation commission approval of plans for projects on which the funds are to be used. In counties having the township form of county organization, the funds credited to such counties shall be expended solely under the control and supervision of the county court, and shall not be expended by the various townships located within such counties. "Rural land" as used in this section shall mean all land located within any county, except land in incorporated villages, towns, or cities.

(2) Fifteen percent of the remaining net proceeds shall be allocated to the various incorporated cities, towns and villages within the state having a population of more than one hundred according to the last preceding federal decennial census, solely for construction, reconstruction, maintenance, repair, policing, signing, lighting and cleaning roads and streets and for the payment of principal and interest on indebtedness incurred prior to January 1, 1980, on account of road and street purposes, and the use thereof being subject to such other provisions and restrictions as provided by law. The amount apportionable to each city, town or village shall be based on the ratio that the population of the city, town or village bears to the population of all incorporated cities, towns or villages in the state having a like population, as shown by the last federal decennial census, provided that any city, town or village which had a motor fuel tax prior to the adoption of this section shall annually receive not less than an amount equal to the net revenue derived therefrom in the year 1960; and

(3) All the remaining net proceeds in excess of the allocations to counties, and to cities, towns and villages under this section shall be allocated to the state and shall be disbursed as provided in section 30(a) and (b) of Article IV of this Constitution.

2. The director of revenue of the state shall make the division and apportionment of the funds monthly in the manner required hereby.

3. Except for taxes or licenses which may be imposed uniformly on all merchants or manufacturers based upon sales, or which uniformly apply ad valorem

to the stocks of merchants or manufacturers, no political subdivision in this state shall collect any tax, excise, license or fee upon, measured by or with respect to the importation, receipt, manufacture, storage, transportation, sale or use, on or after the first day of the month next following the adoption of this section of fuel used for propelling motor vehicles, unless the tax, excise, license or fee is approved by a vote of the people of any city, town or village subsequent to the adoption of this section, by a two-thirds majority. All funds collected shall be used solely for construction, reconstruction, maintenance, repair, policing, signing, lighting, and cleaning roads and streets and for the payment of principal and interest on indebtedness incurred prior to January 1, 1980, on account of road and street purposes.



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 898
(314) 751-3321

May 20, 1988

OPINION LETTER NO. 130-88

The Honorable Roy D. Blunt
Missouri Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Secretary Blunt:

You have submitted to us a statement of purpose prepared pursuant to Section 116.334, RSMo 1986. The statement which you have submitted is as follows:

Shall the Constitution of Missouri be amended by adding a new Article Entitled "Health Care" which will create a trust fund to provide health care coverage for persons experiencing catastrophic or high-risk illnesses, assist certain persons with medicare premiums, provide health care coverage to certain uninsured persons and which will provide for the collection of an earnings tax of six-tenths of one percent which, when collected, will be kept separate from general revenue and allocated on a percentage basis for the various health care coverages?

See our Opinion Letter No. 124-88.

We approve the legal content and form of the proposed statement. Under the provisions of Section 116.334, the approved statement of purpose, unless altered by a court, is the petition title for the measure circulated by the petition and the ballot title if the measure is placed on the ballot.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

May 24, 1988

OPINION LETTER NO. 131-88

The Honorable Roy D. Blunt
Missouri Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Secretary Blunt:

You have submitted to us a statement of purpose prepared pursuant to Section 116.334, RSMo 1986. The statement which you have submitted is as follows:

Shall Article IV Section 30(a) of the Constitution of Missouri be amended to change from ten to fifteen percent the amount of highway motor vehicle fuel tax funds allocated for the "County Aid Road Trust Fund" and to include the City of St. Louis in the "County Aid Road Trust Fund"?

See our Opinion Letter No. 128-88.

We approve the legal content and form of the proposed statement. Under the provisions of Section 116.334, the approved statement of purpose, unless altered by a court, is the petition title for the measure circulated by the petition and the ballot title if the measure is placed on the ballot.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General

COUNTIES:

DISSOLUTION OF SPECIAL

ROAD DISTRICTS:

ROAD DISTRICTS:

SPECIAL ROAD DISTRICTS:

The special road districts created in 1919 in Ripley County, a non-township county, pursuant to Section 10464 of Chapter 102, RSMo 1909, are subject to the dissolution

procedure set forth in Section 233.295, RSMo 1986, or, if the alternative form of county highway commission is adopted pursuant to Section 230.210, RSMo 1986, the special road districts are abolished under Section 230.225, RSMo 1986.

October 21, 1988

OPINION NO. 134-88

The Honorable Joseph L. Driskill
Representative, District 154
Post Office Box 412
Doniphan, MO 63935

Dear Representative Driskill:

This opinion is in response to your question which can be summarized as follows:

Which provision or provisions of law provide the necessary procedure for the dissolution of special road districts in counties of the third class where the special road districts were organized pursuant to the provisions of Chapter 102, RSMo 1909?

The information you provided indicates the special road districts of Ripley County were organized in 1919 under Chapter 102, RSMo 1909. We further understand that the county was not under township organization.

The statute under which the special road districts were created is Section 10464 of Chapter 102, RSMo 1909, which states as follows:

Sec. 10464. Counties to be divided into road districts, how.--The county courts of all counties, other than those under township organization, shall, during

The Honorable Joseph L. Driskill

the month of January, 1910, with the advice and assistance of the county highway engineer, divide their counties into road districts of suitable and convenient size, to be numbered, and of not less than nine square miles nor more than one municipal township in area. And said courts shall, during the same month in any succeeding year, have authority to change the boundaries or number of such road districts as the best interests of the public may require.

The above-cited language from Section 10464 of Chapter 102, RSMo 1909, appears in subsequent provisions of the law including Chapter 98, Article VIII, Section 10833, RSMo 1919. The comparable provision today is contained in Section 233.170, RSMo 1986, which provides:

233.170. County commissions may form districts.--1. County commissions of counties not under township organization may divide the territory of their respective counties into road districts, and every such district organized according to the provisions of sections 233.170 to 233.315 shall be a body corporate and possess the usual powers of a public corporation for public purposes, and shall be known and styled ".road district of.County", and in that name shall be capable of suing and being sued, of holding such real estate and personal property as may at any time be either donated to or purchased by it in accordance with the provisions of sections 233.170 to 233.315, or of which it may be rightfully possessed at the time of the passage of sections 233.170 to 233.315, and of contracting and being contracted with as herein provided.

2. Districts so organized may be of any dimensions that may be deemed necessary or advisable, except that every district shall be included wholly within the county organizing it and shall contain at least

The Honorable Joseph L. Driskill

six hundred and forty acres of contiguous territory; provided, that the county commissions shall not have power to divide the territory within the corporate limits of a city having a population of one hundred fifty thousand into such road district.

The first dissolution provision was enacted in 1913 and was found in Chapter 98, Article VIII, Section 10853, RSMo 1919. It states:

Sec. 10853. Dissolution of road district--petition--notice.--Whenever a petition, signed by the owners of a majority of the acres of land, within a road district organized under the provisions of this article shall be filed with the county court of any county in which said district is situated, setting forth the name of the district and the number of acres owned by each signer of such petition and the whole number of acres in said district, the said county court shall have power, if in its opinion the public good will be thereby advanced to disincorporate such road district. No such road district shall be disincorporated until notice be published in some newspaper published in the county where the same is situated for four weeks successively prior to the hearing of said petition.

The comparable provision today is contained in Section 233.295, RSMo 1986, which provides:

233.295. Dissolution of road district--petition--notice.--Whenever a petition, signed by the owners of a majority of the acres of land, within a road district organized under the provisions of sections 233.170 to 233.315 shall be filed with the county commission of any county in which said district is situated, setting forth the name of the district and the number of acres owned by each signer of such petition and the whole

The Honorable Joseph L. Driskill

number of acres in said district, the said county commission shall have power, if in its opinion the public good will be thereby advanced to disincorporate such road district. No such road district shall be disincorporated until notice be published in some newspaper published in the county where the same is situated for four weeks successively prior to the hearing of said petition.

This is the provision which governs the dissolution of the special road districts in Ripley County, since it continues the same dissolution procedures in existence at the time the districts were created.

Section 230.210, RSMo 1986, provides for the adoption of an alternative form of county highway commission. Such section provides:

230.210. Petition, where filed, contents--form of ballot.--1. Upon petition filed in the office of the clerk of the county commission, of voters equal to five percent of the vote cast for governor in the last preceding general election, requesting the adoption of the alternative county highway commission provided by sections 230.200 to 230.260, the county commission shall, by order of record, submit the question of the adoption of the alternative county highway commission to a vote of the voters of the county at the next general election.

2. The question shall be submitted in substantially the following form:

Shall the alternative county
highway commission be adopted in. . .
. . .County?

3. If a majority of the voters voting upon the question vote for its adoption, the alternative county highway commission shall be declared adopted. If a majority of the voters voting upon the

The Honorable Joseph L. Driskill

question vote against the adoption of the alternative county highway commission, the county in which the election was held shall retain the county highway commission provided by sections 230.010 to 230.110.

Section 230.225, RSMo 1986, provides:

230.225. Township and special road districts abolished, when--districts in more than one county, how handled.--1. All township road districts in counties adopting sections 230.200 to 230.260 are abolished and all assets and liabilities of each township road district shall be transferred to the county highway commission within thirty days of the adoption of sections 230.200 to 230.260 by the county.

2. All special road districts in counties adopting sections 230.200 to 230.260 are abolished and all assets and liabilities of each special road district shall be transferred to the county highway commission within thirty days of the adoption of sections 230.200 to 230.260 by the county. Whenever any district is located in more than one county, the assets and liabilities of the district shall be transferred to the county adopting sections 230.200 to 230.260 in the proportion that the assessed valuation of that part of the district lying in the adopting county bears to the total assessed value of the district.

Therefore, if the alternative form of county highway commission provided by Sections 230.200 to 230.260 is adopted, all special road districts in the county are abolished.


The special road districts in Ripley County about which you are concerned can be dissolved in either of two ways. The districts can be dissolved pursuant to Section 233.295 or, if the alternative form of county highway commission is adopted pursuant to Section 230.210, the districts are abolished under Section 230.225.

The Honorable Joseph L. Driskill

CONCLUSION

It is the opinion of this office that the special road districts created in 1919 in Ripley County, a non-township county, pursuant to Section 10464 of Chapter 102, RSMo 1909, are subject to the dissolution procedure set forth in Section 233.295, RSMo 1986, or, if the alternative form of county highway commission is adopted pursuant to Section 230.210, RSMo 1986, the special road districts are abolished under Section 230.225, RSMo 1986.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General

CRIMES AND PUNISHMENT:
CRIMINAL LAW:

Lethal injection may be used to
carry out the execution of those
sentenced to death prior to the

effective date of Section 546.720 as enacted by Conference
Committee Substitute for Senate Committee Substitute for House
Committee Substitute for House Bills Nos. 1340 & 1348, 84th
General Assembly, Second Regular Session (1988).

September 27, 1988

OPINION NO. 138-88

Dick D. Moore, Director
Department of Corrections & Human Resources
Post Office Box 236
Jefferson City, Missouri 65102-0236

Dear Director Moore:

This opinion is in response to your question asking:

Can the Director of the Division of Adult
Institutions utilize lethal injection,
pursuant to Section 546.720 - 546.750 of
combined House Bill Nos. 1340 and 1348 to
carry out the execution of those sentenced
to death prior to the effective date of
House Bill Nos. 1340 and 1348?

Section 546.720 as enacted by Conference Committee
Substitute for Senate Committee Substitute for House Committee
Substitute for House Bills Nos. 1340 & 1348, 84th General
Assembly, Second Regular Session (1988) (hereinafter "HB 1340 &
1348") provides:

546.720. The manner of inflicting the
punishment of death shall be by the
administration of lethal gas or by means
of the administration of lethal
injection. And for such purpose the
director of the division of adult
institutions is hereby authorized and
directed to provide a suitable and
efficient room or place, enclosed from
public view, within the walls of a
correctional institution controlled by the
division of adult institutions, and the
necessary appliances for carrying into
execution the death penalty by means of the

Dick D. Moore, Director

administration of lethal gas or by means
of the administration of lethal
injection. (Emphasis added.)

The provisions highlighted above by underlining authorizing the administration of lethal injection were added in 1988 by HB 1340 & 1348. HB 1340 & 1348 was effective August 13, 1988.

A similar issue arose when the Missouri statutes were amended to provide for execution of the sentence of death by the administration of lethal gas rather than by hanging. In State v. Brown, 112 S.W.2d 568 (Mo. 1937), which considered the statutory change from execution by hanging to execution by the administration of lethal gas, the Missouri Supreme Court held that a change in the method of carrying out a sentence of death did not affect a change in the punishment but merely abated "some of the odious features incident to the old method." The court stated:

If, therefore, the change in the law under discussion did not affect any substantial rights of the defendant, either constitutional or statutory, but was passed for the purpose of providing a more humane manner of inflicting the death penalty, why should the new statute not apply to those cases pending at the time the change went into effect? Such statutes, as the above cases disclose, are not derogatory of any right a defendant had prior to the enactment thereof. In nature they are procedural, not substantive, and operate prospectively. The changes are intended to be a benefit and not a detriment. . . . As the Supreme Court of the United States said in the Malloy Case, supra: "The punishment was not increased, and some of the odious features incident to the old method were abated."

* * *

We therefore hold that it was the intent and purpose of the Legislature of this state that the infliction of the death penalty under the laws of this state, after

Dick D. Moore, Director

the taking effect of the new act, should be carried out under the method prescribed by the new act.

Id. at 571.

We believe that the opinion of the court in Brown controls in the present circumstance. The apparent motivating factor behind the current legislative change is the same as the one cited by the Brown court, to remove "some of the odious features incident to the old method." Thus, the conclusion in Brown that the sentence may be carried out in accordance with the current statutory method applies here.

CONCLUSION

It is the opinion of this office that lethal injection may be used to carry out the execution of those sentenced to death prior to the effective date of Section 546.720 as enacted by Conference Committee Substitute for Senate Committee Substitute for House Committee Substitute for House Bills Nos. 1340 & 1348, 84th General Assembly, Second Regular Session (1988).

Very truly yours,



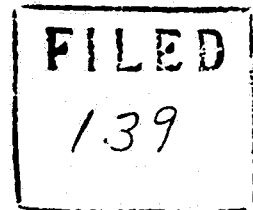
WILLIAM L. WEBSTER
Attorney General

COUNTIES: Any increased compensation adopted by
COUNTY OFFICERS: a county salary commission for the
COUNTY OFFICIALS: year 1988 pursuant to Conference
COMPENSATION: Committee Substitute for House
EFFECTIVE DATE OF LAW: Committee Substitute for Senate
Committee Substitute for Senate Bill
No. 431, 84th General Assembly, Second Regular Session (1988) is
effective from the date it is adopted by the county salary
commission.

November 10, 1988

OPINION NO. 139-88

C. David Henderson
Ralls County Prosecuting Attorney
Ralls County Courthouse
New London, Missouri 63459



and

Dennis W. Smithmier
Caldwell County Prosecuting Attorney
Post Office Box 82
Kingston, Missouri 64650

Gentlemen:

Each of you has asked for an opinion from this office as to the effective date of any salary increase voted by the county salary commission for the year 1988 pursuant to the new county compensation bill, Conference Committee Substitute for House Committee Substitute for Senate Committee Substitute for Senate Bill No. 431, 84th General Assembly, Second Regular Session (1988) (hereinafter referred to as "Senate Bill No. 431"). This bill was effective May 13, 1988. Because of the similarities in the questions posed, we have combined your requests into one opinion. Specifically, you ask whether the increased compensation voted by the county salary commission subsequent to the effective date of Senate Bill No. 431 is retroactive to January 1, 1988, or effective only as of the date of its adoption by the salary commission.

In 1987 the General Assembly created a salary commission in every nonchartered county in this state and authorized that commission to establish the compensation for each county office at an amount not greater than that set by law as the maximum compensation. See Section 50.333, RSMo Supp. 1987. The commission was to meet before November 30, 1987, and every second year thereafter. Section 50.333.5, RSMo Supp. 1987. At

C. David Henderson and Dennis W. Smithmier

the 1987 meeting, the commission was to determine the compensation to be paid to every county officer holding office on January 1, 1988. Section 50.333.6, RSMo Supp. 1987. Senate Bill No. 431 amended Section 50.333 as of May 13, 1988, the day it was signed into law by the Governor. Among other things, it allowed the salary commission to readjust the salary levels for the year 1988 under certain circumstances. Subsection 10 of Section 50.333 as amended by Senate Bill No. 431 provides:

10. The salary commission in each county which did not adopt a salary level of one hundred percent in 1987 and, upon petition of two-thirds of the members of the salary commission, the salary commission of any other county shall meet within thirty days after the effective date of this act to reconsider any action or failure to act prior to the effective date of this act. Any salary schedule adopted or adjustments made in a previous salary schedule at the meeting required by this subsection shall be certified to the clerk of the county commission within forty-five days after the effective date of this act and shall become the salary schedule for that county for the current term of office and the term of office for those officers to be elected in 1988 in lieu of any salary schedule adopted prior to the effective date of this act.

According to the information provided in your letters, the salary commission in each of your counties met in accordance with the provisions of Senate Bill No. 431 and adopted an increase in compensation as allowed. The salary schedule which was adopted was certified to the clerk of the county commission within forty-five days after the effective date of Senate Bill No. 431.

In our opinion, any increased compensation adopted by the salary commission for the year 1988 pursuant to Senate Bill No. 431 is effective only from the date it is adopted by the salary commission, provided it is certified to the clerk of the county commission as specified in subsection 10 quoted above. Article VI, Section 11 of the Missouri Constitution, as amended August 5, 1986, provides:

Section 11. Compensation of county officers--increases in compensation not to require additional services--statement of

C. David Henderson and Dennis W. Smithmier

fees and salaries.--1. Except in counties which frame, adopt and amend a charter for their own government, the compensation of all county officers shall either be prescribed by law or be established by each county pursuant to law adopted by the general assembly. A law which would authorize an increase in the compensation of county officers shall not be construed as requiring a new activity or service or an increase in the level of any activity or service within the meaning of this constitution. Every such officer shall file a sworn statement in detail, of fees collected and salaries paid to his necessary deputies or assistants, as provided by law.

2. Upon approval of this amendment by the voters of Missouri the compensation of county officials, or their duly appointed successor, elected at the general election in 1984 or 1986 may be increased during that term in accordance with any law adopted by the general assembly or, in counties which have adopted a charter for their own government, in accordance with such charter, notwithstanding the provisions of section 13 of article VII of the Constitution of Missouri.

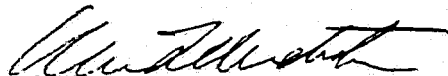
Pursuant to Section 50.333, as amended by Senate Bill No. 431, the General Assembly has created a vehicle for adjusting salaries for county officials through the county salary commission. However, retroactive application of any law is not favored in this state. The Missouri Supreme Court has said that a statute which involves the substance of a matter operates prospectively unless specific legislative intent of retrospective application expressly appears or there is a necessary or unavoidable implication to that effect. Pipe Fabricators, Inc. v. Director of Revenue, 654 S.W.2d 74, 77 (Mo. banc 1983). Nothing in Senate Bill No. 431 states or suggests any intent of the General Assembly that salary adjustments for the year 1988 adopted pursuant to Senate Bill No. 431 be considered effective retroactively to January 1, 1988. Furthermore, Article III, Section 39(3) of the Missouri Constitution prohibits the General Assembly from authorizing any county to grant extra compensation to a public officer after service has been rendered.

C. David Henderson and Dennis W. Smithmier

CONCLUSION

It is the opinion of this office that any increased compensation adopted by a county salary commission for the year 1988 pursuant to Conference Committee Substitute for House Committee Substitute for Senate Committee Substitute for Senate Bill No. 431, 84th General Assembly, Second Regular Session (1988) is effective from the date it is adopted by the county salary commission.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

ECONOMIC DEVELOPMENT,
DEPARTMENT OF:
FINANCE, DIVISION OF:

Section 367.140, RSMo 1986
requires the Director of Finance
to issue a certificate of
registration to an applicant
when the applicant has complied with the statutory conditions.

September 12, 1988

OPINION NO. 144-88

Carl M. Koupal, Jr., Director
Department of Economic Development
Truman State Office Building, 6th Floor
Jefferson City, Missouri 65101

Dear Mr. Koupal:

This opinion is in response to your question asking:

Is the issuance of a Chapter 367 consumer
loan license a ministerial act by the
Commissioner of Finance upon receipt of
required materials, including an audit, or
must/may the Commissioner refuse such a
license where the audit reflects insolvency?

Specifically, you ask our opinion in respect to the powers
and duties of the Director of Finance as they relate to
licensing of small loan companies. In your opinion request, you
state:

The Missouri Division of Finance is an
agency within the Department of Economic
Development and as Director of that
Department, I request an opinion concerning
the responsibilities of the Commissioner of
Finance concerning the licensing provisions
of Chapter 367.

Section 367.140 reads, in pertinent part:
[Section 367.140 is quoted hereinafter.]

This language suggests that the issuance of
a license is ministerial. However,
Sections 367.205 through 367.215, added to
the law in 1972, impose a requirement that

Carl M. Koupal, Jr., Director

a certified audit also be supplied by the lender to complete the application process. There is no mention of evaluation of the audit whereunder the Commissioner would insist that the audit reflect solvency before issuing the license. This gives rise to my question.

Section 367.140, RSMo 1986, to which you refer, provides:

367.140. Annual registration--fee, amount--certificates, issuance, display.--1. Every lender shall, at the time of filing application for certificate of registration as provided in section 367.120 hereof, pay the sum of three hundred dollars as an annual registration fee for the period ending the thirtieth day of June next following the date of payment and in full payment of all expenses for investigations, examinations and for the administration of sections 367.100 to 367.200, except as provided in section 367.160, and thereafter a like fee shall be paid on or before June thirtieth of each year; provided, that if a lender is supervised by the commissioner of finance under any other law, the charges for examination and supervision required to be paid under said law shall be in lieu of the annual fee for registration and examination required under this section. The fee shall be made payable to the director of revenue. If the initial registration fee for any certificate of registration is for a period of less than twelve months, the registration fee shall be prorated according to the number of months that said period shall run.

2. Upon receipt of such fee and application for registration, and provided the bond, if required by the director, has been filed, the director shall issue to the lender a certificate containing the lender's name and address and reciting that such lender is duly and properly registered to conduct the supervised business. The lender shall keep this certificate of

Carl M. Koupal, Jr., Director

registration posted in a conspicuous place at the place of business recited in the registration certificate. Where the lender engages in the supervised business at or from more than one office or place of business, such lender shall obtain a separate certificate of registration for each such office or place of business.

3. Certificates of registration shall not be assignable or transferable except that the lender named in any such certificate may obtain a change of address of the place of business therein set forth. Each certificate of registration shall remain in full force and effect until surrendered, revoked, or suspended as herein provided. (Emphasis added.)

Sections 367.205 through 367.215, RSMo 1986, to which you refer, provide:

367.205. Annual audit by certified public accountant required.--All persons and entities licensed under the provisions of sections 367.100 to 367.200 shall cause an audit to be made once each year by a certified public accountant firm, of which at least one partner is the holder of a Missouri certified public accountant license. In the event that entities licensed under the provisions of sections 367.100 to 367.200 are affiliated with entities which engage in other than such licensed activities in this state or elsewhere, an audit of the financial statements which consolidate the financial statements of the licensee, made according to generally accepted auditing standards, will be sufficient for the purpose of sections 367.205 to 367.215.

367.210. Audit report to director of finance, when.--A copy of the report of the audit required by section 367.205 shall be delivered to the director of finance of the state of Missouri at least thirty days prior to the license renewal date.

Carl M. Koupal, Jr., Director

367.215. Failure to file audit report, effect of.--The director of finance shall not issue a renewal license to any person or entity licensed under the provisions of sections 367.100 to 367.200 unless the audit report is furnished as required by section 367.210.

The term "ministerial duties" was defined in the Missouri case of Yelton v. Becker, 248 S.W.2d 86, 89 (Mo. App. 1952), as follows:

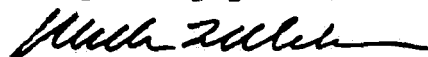
Ministerial duties are those duties of a clerical nature which a public officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed.

In State ex rel. McTague v. McClellan, 532 S.W.2d 870, 872 (Mo. App. 1976), the court stated that "the use of the word 'shall' in a statutory provision generally indicates a mandate" and the court held that the detailed procedures set forth in the statute being considered in that case were ministerial. Section 367.140 requires that the Director "shall" issue the certificate of registration upon compliance by the applicant with the statutory conditions. This statute does not grant the Director any discretion in refusing to issue the certificate when the applicant has complied with the statutory conditions. Neither do Sections 367.205 through 367.215 provide any authority for the Director to refuse to issue the certificate even if the required audit indicates insolvency. Therefore, the Director is required to issue the certificate and does not have discretion to refuse because the audit indicates insolvency.

CONCLUSION

It is the opinion of this office that Section 367.140, RSMo 1986 requires the Director of Finance to issue a certificate of registration to an applicant when the applicant has complied with the statutory conditions.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

EDUCATIONAL FUNDS:
EDUCATIONAL TELEVISION:
SCHOOLS:
SCHOOL FUNDS:
TUITION:

Fees charged by educational entities to provide coursework for high school credit, delivered to students via interactive satellite communication systems, must

be paid from either the free textbook fund or the incidental fund.

December 22, 1988

OPINION NO. 146-88

The Honorable Jerry W. Burch
Representative, District 124
Route 1, Box 222
Walker, Missouri 64790

Dear Representative Burch:

This opinion is in response to your question asking:

May payments for tuition fees, charged by educational entities to provide coursework for high school credit, delivered to students via interactive satellite communications systems, be paid from the Teachers Fund pursuant to Sec. 165.011, subsections 1 and 3, RSMo?

The "tuition fees" to which you refer are sums paid by the local school district to an entity which provides the interactive satellite coursework. That entity has previously purchased classroom services from another school for purposes of transmitting them through interactive communication via satellite to a local public school.

Section 165.011.1, RSMo 1986, establishes the following funds for the accounting of all public school moneys: teachers' fund, incidental fund, free textbook fund, building fund and debt service fund. Subsection 3 of Section 165.011, RSMo 1986, provides in part:

"Tuition shall be paid from either the teachers' or incidental funds."

If subsection 3 were the only statute on the subject, the question would be whether the term "tuition" in subsection 3 could include payments for interactive satellite instruction. However, the legislature has specifically addressed the subject

The Honorable Jerry W. Burch

of which fund can be used to pay for such instruction in Sections 170.051 and 170.057, RSMo 1986. Subsection 4 of Section 170.051 provides in pertinent part:

The [public school] board may also expend either textbook fund moneys or incidental fund moneys to provide supplementary texts, library and reference books, contractual educational television services, and instructional supplies for all the pupils of the public schools of the district.
[Emphasis added.]

Section 170.057 provides:

The school board of any school district may expend either textbook fund moneys or incidental fund moneys to provide supplementary texts, library reference books, instructional supplies and contractual educational television services for the pupils of the district's elementary and secondary schools.
[Emphasis added.]

These statutes prevail over subsection 3 of Section 165.011 on the issues raised in your opinion request.

Statutes must be read in pari materia and, if possible, given effect to each clause and provision. Where one statute deals with a subject in general terms and another deals with the same subject in a more minute way, the two should be harmonized if possible, but to the extent of any repugnancy between them the definite prevails over the general.

State ex rel. Fort Zumwalt School District v. Dickherber, 576 S.W.2d 532, 536-537 (Mo. banc 1979). Accord, Westbrook v. Board of Education of the City of St. Louis, 724 S.W.2d 698, 701 (Mo.App., E.D. 1987).

Therefore, even if the payments in question could be considered "tuition" under Section 165.011.3, the more specific statutes, Sections 170.051.4 and 170.057, prevail to provide that such payments must be made out of the free textbook or incidental funds.

The Honorable Jerry W. Burch

Reference should also be made to the provisions of the "Video Instructional Development and Educational Opportunity Program" recently enacted in Section 170.250, RSMo Supp. 1988, which is effective January 1, 1989, and which the State Board of Education is responsible for implementing within ninety days after that date. The purpose of the program is "to encourage all educational institutions in Missouri to supplement educational opportunities through telecommunications technology and satellite broadcast instruction." Section 170.250.1. Under this program, the State Board of Education may use monies in the "Video Instructional Development and Educational Opportunity Fund" (established in the State Treasury pursuant to subsection 2 of Section 170.250) for contractual services and grants relating to the development and provision of educational opportunities which take place through telecommunication technology and satellite broadcasts. Subsections 5 and 6 of Section 170.250.

Regarding the payment for satellite broadcast services by local school districts under the program, Section 170.250.9 provides in pertinent part:

9. Instructional programs developed under this section which are transmitted one way through the airwaves or by cable television shall be available to all residents of a state without charge or fee to the extent permitted by the Missouri Constitution. "Without charge or fee" shall not require the providing of equipment to transmit or receive telecommunications instruction or the providing of commercial cable television service If a subscription fee is charged by the originator of the program, the district or institution may pay the subscription fee for all participants from the grant under this section or from any other public or private fund legally authorized to be used for this purpose.

. . . .

Based on the above, subscription fees charged by the originator of programs developed under Section 170.250 may be paid by grants made under that statute. As for which of the funds created by Section 165.011.1 are "legally authorized to be used for this purpose," Sections 170.051.4 and 170.057 limit these in regard to public schools to the free textbook and incidental funds. Any grants to local public schools would have

The Honorable Jerry W. Burch

to be deposited in one of these funds under the following provision of subsection 1 of Section 165.011:


Money donated to the school districts shall be placed to the credit of the fund where it can be expended to meet the purpose for which it was donated and accepted.

Grants made by the State Board of Education under Section 170.250 to provide money to pay for these instructional programs, if made without legal consideration, would be considered donations for purposes of Section 165.011.1.¹

CONCLUSION

It is the opinion of this office that fees charged by educational entities to provide coursework for high school credit, delivered to students via interactive satellite communication systems, must be paid from either the free textbook fund or the incidental fund.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General

¹Black's Dictionary of Law (Fifth Edition) provides the following as one of the definitions of "grant" on page 629:

"To bestow or confer, with or without compensation, a gift or bestowal by one having control or authority over it, as of land or money."

Webster's Third New International Dictionary provides as one of the definition of "grant" at page 989:

"2: something granted; esp.: a gift (as of land or a sum of money) usu. for a particular purpose"

Webster's provides the following as one of the definitions of "donate" at page 673:

The Honorable Jerry W. Burch

"1. a: to make a free gift or a grant
of: contribute esp. to a charitable cause
or toward a public service institution
. . . ."

As stated in State ex rel. Rothrum v. Darby, 345 Mo.
1002, 137 S.W.2d 532, 539 (1940):

"A donation according to Webster's
International Dictionary, is a gift, a
'voluntary alienation of property' or
'gratuitous transfer of property.'
'Donate' means 'to give gratuitously or
without any consideration.' 19 C.J. 444."

It was stated in Staley v. Paddock, 301 S.W.2d 878, 880
(K.C. Ct.App. 1957):

"'A "donation" has no other meanings than a
voluntary contribution or gift, which one
may make or refuse to make, or he may
elect.'" [Courts emphasis.]



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P.O. Box 899
(314) 751-3321

November 10, 1988

OPINION LETTER NO. 149-88

Briney Welborn
Stoddard County Prosecuting Attorney
Post Office Box Q
Bloomfield, Missouri 63825

Dear Mr. Welborn:

This opinion letter is in response to your questions regarding a contract entered into by the sheriff of Stoddard County and the Stoddard County Ambulance District whereby the sheriff of Stoddard County agreed to dispatch emergency calls to the ambulance district in return for monetary compensation paid to the sheriff. You have posed the following questions:

1. Is the sheriff of Stoddard County authorized to enter into this contract or must the contract be approved by the Stoddard County Commission?
2. May the compensation paid pursuant to this contract be paid directly to the sheriff's deputies for additional duties performed or must any sums received under the contract be deposited in the general revenue of Stoddard County?

In response to your first question, in Attorney General Opinion No. 86, Caskey, 1981, a copy of which is enclosed, this office concluded that a contract entered into by a county sheriff and the United States Secretary of the Army for special law enforcement services by a sheriff must have the approval of the county court. Likewise, in Attorney General Opinion No. 23, Kuhlman, 1970, a copy of which is also enclosed, this office concluded that a contract entered into between the county clerk of Clay County and several municipalities of Clay County to provide a common service pursuant to a cooperative agreement statute, must be taken before the county court of Clay County for approval. Therefore, this contract between the sheriff of

Briney Welborn

Stoddard County and the ambulance district is subject to approval by the Stoddard County Commission.

Your second question inquires whether any compensation received under this contract may be paid directly to the sheriff's deputies in consideration for additional duties performed or whether any sums paid under the contract must be deposited in the general revenue fund of Stoddard County. Again, Attorney General Opinion No. 86, Caskey, 1981, is directly analogous to your situation. Any monies collected by the sheriff of Stoddard County for services rendered pursuant to the contract must be remitted to the general revenue fund of the county.

Therefore, it is the opinion of this office that the contract between the sheriff and the ambulance district is subject to approval by the Stoddard County Commission, and any funds paid to the sheriff pursuant to said contract must be deposited in the general revenue fund of Stoddard County.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

Enclosures

Opinion No. 23, Kuhlman, 1970
Opinion No. 86, Caskey, 1981

COUNTIES: All funds received by a county from a
COUNTY JAIL: sales tax imposed pursuant to Section
COUNTY SALES TAX: 67.700, RSMo 1986, for the purpose of
TAXATION - the construction of a county jail and
COUNTY SALES TAX: sheriff's facility, and any interest
earned upon the investment of such
funds, must be expended solely for the construction, maintenance
and utilization of such facility.

November 21, 1988

OPINION NO. 164-88

Gordon Rolla Upchurch
Franklin County Prosecuting Attorney
414 East Main Street
Union, Missouri 63084

Dear Mr. Upchurch:

This opinion is in response to your question asking:

May funds collected pursuant to a
Sales Tax collected pursuant to Section
67.700, RSMo 1986, and the interest earned
thereon, be used for any purpose other than
the capital improvement specified on the
ballot creating such a tax, where the funds
collected and interest earned thereon
exceed present needs after payment of all
costs associated with the originally
contemplated construction?

Section 67.700, RSMo 1986, authorizes certain counties to
impose a sales tax on retail sales made in such county for any
capital improvement purpose designated by the county in the
ballot of submission to the voters of the county and approved by
a majority of the qualified voters voting on such proposal.

Your opinion request advises that in 1983 the voters in
Franklin County approved, and the Franklin County Commission
imposed, a sales tax pursuant to Section 67.700, RSMo 1986, for
a period of six (6) years ending December 31, 1989, for the
purpose of "the construction of a county jail and sheriff's
facility". You further advise that the facility has been

Gordon Rolla Upchurch

completed; that all construction costs and related expenses have been paid; that a balance of approximately \$1.5 million remains in the fund established for such purpose; that the fund will continue to grow from additional sales tax revenue collected until December 31, 1989, as well as from interest earned from investment of the fund; and that no additional capital improvement to the facility is contemplated at this time.

Subsection 7 of Section 67.700, RSMo 1986, states:

All revenue received by a county from the tax authorized by sections 67.700 to 67.727 which has been designated for a certain capital improvement purpose shall be deposited in a special trust fund and shall be used solely for such designated purpose. Upon the expiration of the period of years approved by the voters under subsection 2 of this section or if the tax authorized by sections 67.700 to 67.727 is repealed under section 67.721, all funds remaining in the special trust fund shall continue to be used solely for such designated capital improvement purpose. Any funds in such special trust fund which are not needed for current expenditures may be invested by the governing body in accordance with applicable laws relating to the investment of other county funds.

Subsection 7 evidences a clear legislative intent that all revenues received from the sales tax imposed pursuant to Section 67.700, RSMo 1986, including interest from the investment of such funds, must be devoted solely to the capital improvement purpose designated in the ballot of submission and approved by the voters of the county, and that the county is without authority to expend such funds for any other purpose. See Opinion Letter No. 104-87, a copy of which is enclosed, and State ex rel. Fort Zumwalt School District v. Dickherber, 576 S.W.2d 532, 537 (Mo. banc 1979).

Further, the designated capital improvement purpose approved by the voters of Franklin County (i.e., "construction of a county jail and sheriff's facility") encompasses not only the actual construction of such facility, but also the maintenance and utilization of the completed facility. See Opinion No. 14-88, a copy of which is enclosed. Cf. Sections 67.550.3 and 67.590.3, RSMo 1986.

Gordon Rolla Upchurch

CONCLUSION

It is the opinion of this office that all funds received by a county from a sales tax imposed pursuant to Section 67.700, RSMo 1986, for the purpose of the construction of a county jail and sheriff's facility, and any interest earned upon the investment of such funds, must be expended solely for the construction, maintenance and utilization of such facility.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

Enclosures:

Opinion No. 104-87

Opinion No. 14-88



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P.O. Box 899
(314) 751-3321

September 14, 1988

OPINION LETTER NO. 167-88

The Honorable E. J. Cantrell
Representative, District 82
3406 Airway
Overland, Missouri 63114

Dear Representative Cantrell:

This opinion letter is in response to your questions regarding the "100-hour rule." Your opinion request outlines three questions. Basically you are asking whether the so-called "100-hour rule" has authority of law and what constitutes sufficient evidence to invoke the provisions of Section 290.210(3), RSMo 1986, requiring the Division of Labor Standards to go to two or more counties adjacent to the one in which the work or construction is to be performed when the determination has been made that there are not a sufficient number of competent skilled workmen to construct the public works efficiently and properly in the county where the work is to be done.

With regard to the "100-hour rule," there is neither a regulation nor a statute that prescribes this rule. This is a matter of policy of the Division of Labor Standards. The policy apparently is to simplify the determination process and while it may constitute some evidence of work being performed in a county of the nature being considered under the wage determination, it is incumbent on the division to look under every stone to find whether evidence exists for a determination of whether there is a sufficient number of competent skilled workmen to construct public works efficiently and properly.

Section 290.210(3), RSMo 1986, defines "locality" as meaning:

. . . the county where the physical work upon public works is performed, except that if there is not available in the county a sufficient number of competent skilled workmen to construct the public works efficiently and properly,

The Honorable E. J. Cantrell

"locality" may include two or more counties adjacent to the one in which the work or construction is to be performed and from which such workers may be obtained in sufficient numbers to perform the work, and that, with respect to contracts with the state highways and transportation commission, "locality" may be construed to include two or more adjacent counties from which workmen may be accessible for work on such construction.

Examples of evidence which might be sufficient to sustain a determination that there are sufficient competent skilled workmen to construct the public works to be performed in the county might include - does the work require one carpenter and is there one carpenter in the county? Does the work require one laborer and is there a laborer in the county? How many competent skilled workmen are required to perform the particular job? Does the county contain that number? Certainly by looking at such things as building permits in the city records the division can ascertain whether the needs of the project can be met in the county. One hundred hours in and of themselves do not really tell us who is performing the work or from where they come. We would recommend that the division find a different mode of making the determination than what is perceived by policy to be a 100-hour rule.

In your inquiry you suggest that the division ignores collective bargaining agreements. If Section 290.210(3) is invoked in terms of going to adjacent counties because there is a lack of sufficient number of competent skilled workmen to construct the public works project efficiently and properly, then one turns to Section 290.260.1, RSMo 1986, which requires the department in determining prevailing wages to consider the applicable wage rates established by collective bargaining agreements, if any, and the rates that are paid generally within the locality. So if they go outside of the county to two or more adjoining counties, then the general rates in those counties must be considered, as well as the rates established by the collective bargaining agreements.

As to whether a collective bargaining agreement rate in a county applies over other rates, the question is not whether there is a collective bargaining agreement in the county where the work is to be done. The question is whether there is a sufficient number of competent skilled workmen to construct the public works efficiently and properly in the county where the physical work upon the public works is to be performed which is the subject of the wage determination.

The Honorable E. J. Cantrell

Under Section 290.220, RSMo 1986, "It is hereby declared to be the policy of the state of Missouri that a wage of no less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed shall be paid to all workmen employed by or on behalf of any public body engaged in public works exclusive of maintenance work."

The object of analyzing the prevailing wage law is to ascertain legislative intent. Under Section 290.210(3), if there are not sufficient competent skilled workmen to construct a public works project, then we go to adjoining counties to try to determine if they have sufficient workers to perform the work. It is extremely difficult to apply a strict rule or policy of 100 hours to a project which may last several years and be in the millions of dollars. If it is truly the intent of the legislature to determine the prevailing hourly rate for wages for work of a similar character in the locality, then it seems logical to look in adjoining counties to see if similar work has been performed of the magnitude involved in the particular wage determination. The one difficulty, however, is that arguably if you have a collective bargaining agreement in the county where the work is to be performed, then you may well have a sufficient number of competent skilled workmen to construct the public works project efficiently and properly. However, that may not be the case when the only hours available are a hundred or less regardless of the affiliation of the worker. Thus it would seem to be appropriate in those cases to go to an adjoining county under Section 290.210(3) and look for work of a similar character to try to determine fairly what the proper rates are for the various crafts to perform the work.

The thoughts contained in this opinion letter do not preclude the division from considering the promulgation of a rule with reference to the policy established of looking at 100 hours of work. However, absent that rule the division does not appear to have sufficient authority to internally invoke a 100-hour rule in the prevailing wage process.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

EXPUNGEMENT: The word "expunged" used in Sections
LIENS - LIEN SEARCH: 144.380.1(2) and 143.902.1(2), House
DIRECTOR OF REVENUE: Bill No. 1335, 84th General
Assembly, Second Regular Session
(1988), means striking out, blotting, obliterating or in any
permanent manner completely concealing or excising a record or
part of a record. Liens filed in error by the director of
revenue are not to be released by the filing of a document
subsequent to the recording of such liens because such liens are
to be expunged, thereby leaving nothing to be released.

November 10, 1988

OPINION NO. 168-88

The Honorable Anthony D. Ribaud
Representative, District 65
State Capitol Building, Room 309
Jefferson City, Missouri 65101

Dear Representative Ribaud:

This opinion is in response to your questions asking:

(A) What is the definition of the word
"expunged" as used in the context of
Section 144.380.1(2), House Bill No. 1335,
84th General Assembly, Second Regular
Session (1988)?

(B) Is the intent of this section to cause
a document to be recorded subsequent to the
recording of the erroneous lien which has
the effect of releasing the lien
erroneously recorded?

Section 144.380.1(2), House Bill No. 1335, 84th General
Assembly, Second Regular Session (1988), provides:

(2) If any lien or liens have been
erroneously or improvidently filed, the
taxpayer or any other person affected by
the lien may notify the director of
revenue. The taxpayer or other affected
person shall provide the director with the
reasons the filing of the lien is erroneous
or improvident as to such person (including
that the affected person's name or other
identification is similar to the
taxpayer's) and a list of creditors with

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current addresses who are affected by the department's action. Upon receipt of the creditor list, reasons and verification of the erroneous or improvident filing, the director shall release the lien as to the taxpayer or the affected person, as necessary, and notify all creditors, stating the lien or liens filed were erroneously or improvidently attached. If the lien was erroneously or improvidently filed after the effective date of this section, the director shall forthwith make a determination in writing which shall become a public record in the same place the lien is noted under subsection 5 of this section that the same be expunged from the record and give written notice thereof, duly certified, by certified mail to the recorder of deeds in the county where the same is recorded and upon receipt by the recorder of deeds of the certification the recorder shall immediately cause said record to be expunged. The director shall take whatever steps are necessary to ensure the lien is expunged. The director shall pay a three-dollar fee charged by the recorder when an erroneously or improvidently filed lien is expunged. (Emphasis added.)

Also, Section 143.902.1(2), House Bill No. 1335, 84th General Assembly, Second Regular Session (1988), provides:

(2) If any lien or liens have been erroneously or improvidently filed, the taxpayer or any other person affected by the lien may notify the director of revenue. The taxpayer or other affected person shall provide the director with the reasons the filing of the lien is erroneous or improvident as to such person (including that the affected person's name or other identification is similar to the taxpayer's) and a list of creditors with current addresses who are affected by the department's action. Upon receipt of the creditor list, reasons and verification of the erroneous or improvident filing, the director shall release the lien as to the

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taxpayer or the affected person, as necessary, and notify all creditors, stating the lien or liens filed were erroneously or improvidently attached. If the lien was erroneously or improvidently filed the director shall forthwith make a determination in writing which shall become a public record in the same place the lien is noted under subsection 5 of this section that the same be expunged from the record and give written notice thereof, duly certified, by certified mail to the recorder of deeds in the county where the same is recorded and upon receipt by the recorder of deeds of the certification the recorder shall immediately cause said record to be expunged. The director shall take whatever steps are necessary to ensure the lien is expunged. The director shall pay a three-dollar fee charged by the recorder when an erroneously or improvidently filed lien is expunged. (Emphasis added.)

In Baker v. State, 532 S.W.2d 893, 896 (Mo.App. 1976), in reference to Section 195.290, RSMo 1969, and the expungement of the record of a youthful offender who successfully completed a period of probation, the court held:

. . . it is evident that the legislature intended "expunge" to mean "to strike out, blot, obliterate, delete or cancel" that part of the record which identifies it with the offender. It does not call for destruction or annihilation of the records themselves. On the other hand, the requirements of the statute are not met by placing the records in an envelope, sealing them, and retaining them in protective custody. As a practical matter, all records which must be retained by the court and which are identified in any way with the arrest, trial and conviction of the offender, should have all references to him eliminated. This may be done by striking out, blotting, obliterating or in any permanent manner completely concealing or excising the name of the offender, his address and any other identification which

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might associate him with the records of the court. This may be done through the use of ink, chemical or mechanical means just so long as there is no way to read defendant's name or address, or any other identifying words or numbers. All other papers which are not needed for the court's records and files may be destroyed, or, if the court needs certain portions of them, then the same procedure should be followed with respect to them. No part of the file or record should be placed in an envelope or other package with the offender's name or identification thereon and kept under protective custody.

In Bergel v. Kassebaum, 577 S.W.2d 863, 871-872 (Mo.App. 1979), in reference to Section 610.100, RSMo Cum. Supp. 1975, and the expungement of an arrest record, the court stated:

Black's Law Dictionary, Revised Fourth Edition, defines "expunge" to mean: "to destroy or obliterate; it implies not a legal act, but a physical annihilation" These definitions were approved by this court in State ex rel. M.B. v. Brown, 532 S.W.2d 893 (Mo.App. 1976)

In State ex rel. M.B., the court held that the language of § 195.290, RSMo 1969 which allows a youthful offender who has successfully completed probation to apply to the court which sentenced him "for an order to expunge from all official records . . . all recordations of his arrest, trial and conviction" did not mandate the physical destruction of the entire record. Relying on the word "from," the court held, at page 896, that the offender was only entitled to an order "striking out, blotting obliterating or in any manner completely concealing or excising the name of the offender, his address and any other identification which might associate him with the records of the court." The record would be left intact; only those portions which identified or connected the offender with the record would be destroyed.

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Section 610.100 does not use the language of § 195.290 and only states that "all records of arrest . . . shall be expunged." The language of § 610.100 does not support a partial expungement. It must be assumed, therefore, that when the legislature provided "all records of arrest and of any detention or confinement incident thereto shall be expunged" it meant to use "expunge" in the sense defined by Black's and the case law. Thus, when appellant's arrest record was 'expunged,' it was destroyed." (Emphasis added.)

In State ex rel. Curtis v. Crow, 580 S.W.2d 753, 756 (Mo. banc 1969), in construing "expunged" in Section 195.290, RSMo 1975 Supp., the court approved of the lower court's definition of the term in State ex rel. M.B. v. Brown, 532 S.W.2d 893, 896 (Mo.App. 1976) and held that such expungement related not only to the court's records but also to the records in the possession of the prosecuting attorney.

It is clear from the preceding review, that "expunged" refers to a physical act of destroying, in some manner, a record or part of a record.

With respect to your second question relating to the possible filing of a document which would have the effect of releasing a lien filed in error by the director of revenue, Section 144.380.3, House Bill No. 1335, 84th General Assembly, Second Regular Session (1988), provides:

3. The director may release any part of the property subject to the lien by filing with the county recorder a copy of the original lien document and an affidavit containing a legal description of the property and stating that the property is to be released from the lien. The county recorder shall note the partial release in the same manner as provided in section 443.090, RSMo. The release of any specific property shall not affect in any manner other property subject to lien.

Also, Section 143.902.2, House Bill No. 1335, 84th General Assembly, Second Regular Session (1988), provides:

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2. The lien imposed under subsection 1 of this section may be wholly or partly released by filing for record in the office of the county recorder a release thereof executed by the director of revenue upon payment of the tax, interest, additions to tax and penalties or upon receipt by the director of revenue of security sufficient to secure payment thereof, or by final judgment holding such lien to have been erroneously or improvidently imposed.

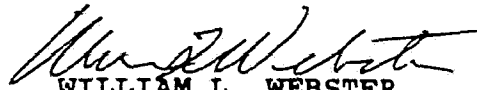
There is no language in either of these sections leading to the conclusion that the references to liens therein are references to "erroneous liens". Therefore, these sections refer to the release of valid liens and not to the release of "erroneous liens". Further, since "erroneous liens" are to be expunged, under Sections 144.380.1(2) and 143.902.1(2), the expunged "erroneous liens" could not be released for the reason that there would be nothing to release after the records of same have been physically obliterated.

There is nothing in the legislation suggesting that the General Assembly intended some meaning other than physical destruction to be given to the word "expunged," nor any language leading to the conclusion that the General Assembly intended that "erroneous liens" be released instead of expunged.

CONCLUSION

It is the opinion of this office that the word "expunged" used in Sections 144.380.1(2) and 143.902.1(2), House Bill No. 1335, 84th General Assembly, Second Regular Session (1988), means striking out, blotting, obliterating or in any permanent manner completely concealing or excising a record or part of a record. Liens filed in error by the director of revenue are not to be released by the filing of a document subsequent to the recording of such liens because such liens are to be expunged, thereby leaving nothing to be released.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General

BALLOTS: Section 115.351, RSMo 1986, prevents
CANDIDATES: a Republican candidate who was
ELECTIONS: defeated in the primary election from
GENERAL ELECTIONS: filing as an independent candidate for
PRIMARY CANDIDATE: the same office in the November
PRIMARY ELECTIONS: general election.

September 13, 1988

OPINION NO. 169-88

Jack L. Miller
Laclede County Prosecuting Attorney
P.O. Box 1222
Lebanon, Missouri 65536

Dear Mr. Miller:

This opinion is in response to your question asking:

Does Section 115.351 prevent a Republican candidate from the primary election, who was defeated, from filing as an independent party candidate in the November general election?

On the opinion request form you submitted, you state that a Republican candidate for sheriff of Laclede County in the August 1988 primary was defeated by approximately 1,000 votes. That candidate has now petitioned the county clerk to place his name as an independent candidate for sheriff in the November general election.

Section 115.351, RSMo 1986, provides:

115.351. Candidate may not file for more than one office or as a candidate for the same office on more than one ticket at the same election.--No person who files as a party candidate for nomination or election to an office shall, without withdrawing, file as another party's candidate or an independent candidate for nomination or election to the office for the same term. No person who files as an independent candidate for election to an office shall, without withdrawing, file as a party candidate for nomination or election to the office for the same term. No person shall file for one office and, without withdrawing, file for another

Jack L. Miller

office to be filled at the same election.
Any person violating any provision of this
section shall be disqualified from running
for nomination or election to any office at
the primary and general election next
succeeding the violation. (Emphasis added.)

The primary rule of statutory construction is to ascertain the intent of the lawmakers from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning. Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397, 401 (Mo. banc 1986). In determining the legislative intent, the courts consider the language of the statute and the words employed in their plain and ordinary meaning. State ex rel. D.M. v. Hoester, 681 S.W.2d 449, 450 (Mo. banc 1984).

In the situation about which you are concerned, the person filed as a Republican party candidate for nomination for the office of sheriff of Laclede County for the next term. He now seeks to file as an independent candidate for election to that same office for the same term. Since the primary election has been concluded, it is not possible for the candidate to come within the exception of having withdrawn. Therefore, Section 115.351 prevents the candidate who is the subject of your question from being an independent candidate for sheriff of Laclede County in the November general election.

CONCLUSION

It is the opinion of this office that Section 115.351, RSMo 1986, prevents a Republican candidate who was defeated in the primary election from filing as an independent candidate for the same office in the November general election.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

ABSENTEE VOTING: Under Section 115.291, RSMo 1986,
ELECTION BALLOTS: a notary public, or any other
ELECTIONS: person of the voter's choice, may
NOTARY PUBLIC: assist a voter in voting his
absentee ballot if the voter is
blind, unable to read or write the English language or
physically incapable of voting his ballot.

November 28, 1988

OPINION NO. 177-88

Scott S. Sifferman
Lawrence County Prosecuting Attorney
Lawrence County Courthouse
Post Office Box 69
Mount Vernon, Missouri 65712

Dear Mr. Sifferman:

This opinion is in response to your question asking:

Is a notary public permitted to assist a
person in voting their ballots upon request
of a voter who is physically incapable of
voting his own ballot?

We understand your question relates to voting by absentee ballot.

Under prior Missouri law (Section 112.050, repealed by the Comprehensive Election Act of 1977), the voter of an absentee ballot was required to mark his or her ballot in the presence of an officer authorized by law to administer oaths. The prior statute specified that the voter exhibit the unmarked ballot to the officer and in the presence of the officer, mark the ballot in a manner that the officer could not see the ballot or know how it was marked. The prior statute made no provision for voters who were blind, unable to read or write the English language, or otherwise disabled. Based on the language of the prior statute, this office opined in Opinion No. 283, Beckerle, October 20, 1972 and in Opinion No. 96, White, August 20, 1954, that it would be improper for the notary public who notarized the absentee ballot to assist in the marking of the ballot.

The current statute on absentee voting, Section 115.291, RSMo 1986, provides:

115.291. Absentee ballot, how
voted--unlawful assistance an election

Scott S. Sifferman

offense.--1. Upon receiving an absentee ballot, the voter shall mark his ballot in secret, place the ballot in the ballot envelope, seal the envelope and fill out the statement on the ballot envelope. The affidavit of each person voting an absentee ballot shall be subscribed and sworn to before the election official receiving the ballot, a notary public or other officer authorized by law to administer oaths. If the voter is blind, unable to read or write the English language, or physically incapable of voting his ballot, he may be assisted by a person of his own choosing. Any person assisting a voter who is not entitled to such assistance, and any person who assists a voter and in any manner coerces or initiates a request or a suggestion that the voter vote for or against or refrain from voting on any question, ticket or candidate, shall be guilty of a class one election offense. If, upon counting, challenge or election contest, it is ascertained that any absentee ballot was voted with unlawful assistance, the ballot shall be rejected.

2. Each absentee ballot shall be returned to the election authority in the ballot envelope and shall only be returned by the voter in person, by mail or by a team of deputy election authorities.

Unlike the prior statute, there is no specific requirement that the officer not see how the ballot is marked. More importantly, the present statute provides that if a voter is "blind, unable to read or write the English language, or physically incapable of voting his ballot, he may be assisted by a person of his own choosing." The plain language of the current statute makes it clear that a notary public is no less authorized to give such assistance than any other person the voter might choose. In determining legislative intent, a statute's language is to be considered in its plain and ordinary meaning. State ex rel. D.M. v. Hoester, 681 S.W.2d 449, 450 (Mo. banc 1984); State v. Kraus, 530 S.W.2d 684, 685 (Mo. banc 1975). The current statute is unambiguous, and in no way suggests that a notary public is prohibited from assisting voters entitled to such assistance. In light of the statutory


Scott S. Sifferman

change, we are withdrawing Opinion No. 283, Beckerle, October 20, 1972 and Opinion No. 96, White, August 20, 1954.

CONCLUSION

It is the opinion of this office that under Section 115.291, RSMo 1986, a notary public, or any other person of the voter's choice, may assist a voter in voting his absentee ballot if the voter is blind, unable to read or write the English language or physically incapable of voting his ballot.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General

ARCHITECTS AND ENGINEERS:
BOARD FOR ARCHITECTS,
PROFESSIONAL ENGINEERS,
AND LAND SURVEYORS:
COUNTY HEALTH CENTER:
PROFESSIONAL REGISTRATION,
DIVISION OF:

Section 327.421, RSMo 1986,
requires a county health board
to hire a currently registered
architect to prepare
specifications used in the
construction of an addition to
its building.

November 8, 1988

OPINION NO. 178-88

James V. Nichols
Barton County Prosecuting Attorney
120 West 10th Street
Lamar, Missouri 64759

Dear Mr. Nichols:

This opinion is in response to your question asking:

Does Section 327.421 require a County
Health Board to hire an architect to
prepare and approve the architectural
drawings and specifications for an addition
to its existing building or does Section
327.421 only require the use of a
registered architect if an architect is
used?

Based on the information you provided, we understand that the Barton County Health Board is constructing a one-story, 22 foot addition to its existing building, and that the proposed addition is of such size that both the county health board and local contractors believe that it is not necessary to hire an architect. The architectural plans for the existing building are approximately 15 years old and did not include specifications for any additions to the original structure. The architectural plans and specifications for the existing building were done by a registered architect.

Section 327.421, RSMo 1986, provides:

327.421. Political subdivisions not to
use unregistered architects, professional
engineers or land surveyors.--This state
and its political subdivisions including
counties, cities and towns, or legally
constituted boards, agencies, districts,
commissions and authorities of this state

James V. Nichols

shall not engage in the construction of public works involving the practice of architecture, engineering or land surveying, unless the architectural and engineering drawings, specifications and estimates and the plats and surveys have been prepared by a currently registered architect, professional engineer or land surveyor, as the case may require.

The primary rule of statutory construction is to ascertain the intent of the lawmakers from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning. Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397, 401 (Mo. banc 1986). In determining the legislative intent, the courts consider the language of the statute and the words employed in their plain and ordinary meaning. State ex rel. D. M. v. Hoester, 681 S.W.2d 449, 450 (Mo. banc 1984).

The county health board falls under the confines of Section 327.421 as it is a legally constituted board of the county. Although Chapter 327 does not define the term "public work", Missouri courts have interpreted the term broadly. See Maurer v. Werner, 748 S.W.2d 839, 841 (Mo.App. 1988). The proposed addition qualifies as a public work under Section 290.210(7), RSMo 1986, which defines the term under the Prevailing Wages on Public Works Act as "all fixed works constructed for public use . . . , " as well as Black's Law Dictionary, which employs a similar definition. Furthermore, such construction would involve the practice of architecture as defined in Section 327.091, RSMo 1986, to include the preparation of specifications used for any additions or alterations to public buildings. Consequently, Section 327.421 requires specifications for the addition to be prepared by a currently registered architect.

CONCLUSION

It is the opinion of this office that Section 327.421, RSMo 1986, requires a county health board to hire a currently registered architect to prepare specifications used in the construction of an addition to its building.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

CITIES, TOWNS AND VILLAGES:
CITY STREETS:
FOURTH CLASS CITIES:

A fourth class city does not
have the authority to create and
operate a toll street.

November 2, 1988

OPINION NO. 179-88

The Honorable Jim Pauley
Representative, District 24
500 Tandy Street
Ashland, Missouri 65010

Dear Representative Pauley:

This opinion is in response to your question asking:

Whether a fourth-class statutory city has
the power to establish a toll street
whereby all motor vehicles using that
street would be required to pay a toll/fee
for such use.

Your question involves the payment of a toll in order to use
a particular street. You have indicated the purpose of such toll
would be to provide funds for the repair of that street.

A municipal corporation is a creature of the legislature,
possessing only those powers expressly granted or those
necessarily or fairly implied in or incidental to express grants,
or those essential to the declared objects of the municipality.
Anderson v. City of Olivette, 518 S.W.2d 34, 39 (Mo. 1975).
Wilson v. City of Waynesville, 615 S.W.2d 640, 643 (Mo.App.
1981). A fourth class city has only such powers as are conferred
upon it by the state. State ex rel. City of Republic v. Smith,
139 S.W.2d 929, 932 (Mo. banc 1940). Any reasonable doubt as to
whether a power has been delegated to a municipality is resolved
in favor of nondelegation. Anderson v. City of Olivette,
supra.; Wilson v. City of Waynesville, supra. We do not
find any statute authorizing a fourth class city to establish a
toll street such as that which is the subject of your question.

In discussing toll bridges, the courts have stated:

Our Supreme Court, en banc, has said that:
"The building or acquiring of toll bridges

The Honorable Jim Pauley

by the state, if authorized, is a legislative function. The Legislature, and it alone, has authority to say whether or not the state shall acquire or build toll bridges." State ex rel. Jones v. Brown, 338 Mo. 448, 456, 92 S.W.2d 718, 721(3). And we would add that the same must be true with respect to the operation of toll bridges. Counsel have not cited, and our independent search has failed to reveal, any constitutional or statutory provision which conferred upon the Commission the authority to operate the bridge under consideration as a toll bridge or from which such authority might have been fairly and reasonably implied. Believing and holding (as we do) that the Commission had no authority to operate the bridge as a toll bridge, (Emphasis in original.)


State ex rel. State Highway Commission v. County of Camden, 394 S.W.2d 71, 77 (Mo.App. 1965).

While fourth class cities have control over their streets, see Section 88.670, RSMo 1986, this general authorization could not be the basis for creating and operating a toll street without a more precise grant of authority.

CONCLUSION

It is the opinion of this office that a fourth class city does not have the authority to create and operate a toll street.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General

COUNTY COMMISSION: When a juvenile court, pursuant
JUVENILE COURT: to Section 1 of House Substitute
JUVENILE COURT BUDGET: for Senate Committee Substitute
CIRCUIT COURTS: for Senate Bill No. 622, 84th
General Assembly, Second Regular
Session (1988) determines that its juvenile court personnel
should be paid more than the state compensation provided in
Section 211.381, RSMo 1986, and the county commission disagrees
with the juvenile court's determination of the reasonableness of
the additional compensation, the county must either provide for
the payment of the additional compensation, obtain the consent
of the circuit court to change or disapprove the request, or
file a petition for review with the Judicial Finance Commission
in accordance with Sections 50.640 and 477.600, RSMo 1986.

November 10, 1988

OPINION NO. 186-88

The Honorable Ray Hamlett
Representative, District 15
State Capitol Building, Room 408B
Jefferson City, Missouri 65101

Dear Representative Hamlett:

This opinion is in response to your question asking:

When a juvenile court, pursuant to section 1
of House Substitute for Senate Committee
Substitute for Senate Bill 622, enacted in
1988, determines that its juvenile court
personnel should be paid more than the state
compensation provided for in section
211.381, RSMo, and the county commission
disagrees with the juvenile court's
determination of the need for additional
compensation, does the county have to
provide such additional compensation or does
the county commission have the right not to
approve the request for additional
compensation pursuant to section 1 of HS for
SCS for SB 622?

Section 1 of House Substitute for Senate Committee
Substitute for Senate Bill No. 622, 84th General Assembly,
Second Regular Session (1988) (hereinafter referred to as
"Senate Bill No. 622") provides:

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Section 1. The provisions of subsection 5 of section 211.381, RSMo, to the contrary notwithstanding, the salary determined pursuant to subsections 1, 2 and 3 of section 211.381, RSMo, is a limit to the state contribution to the compensation paid to juvenile court personnel and is not a limit to the total compensation that may be paid. Any compensation above the amounts determined pursuant to the provisions of this section shall be approved by the judge of the juvenile court and the governing body of the city or county providing such additional compensation.

The Missouri Supreme Court long ago established that it is the judiciary, not the county legislative body, which has the final authority on the question of how much juvenile court employees are to be paid. This holding is based on the state constitutional principle of the separation of the powers of the judiciary and the legislative bodies which prohibits legislative bodies from interfering with the essential operations of the courts. See Article II, Section 1, Missouri Constitution of 1945.

We are of the opinion that within the inherent power of the Juvenile Court of St. Louis County, subject to the supervisory control of the Circuit Court of St. Louis County . . . [citations omitted], is the authority to select and appoint employees reasonably necessary to carry out its functions of care, discipline, detention and protection of children who come within its jurisdiction, and to fix their compensation. In order that the Court may administer justice under the Juvenile Code, it is essential that it control the employees who assist it.

State ex rel. Weinstein v. St. Louis County, 451 S.W.2d 99, 102 (Mo. banc 1970). This principle was later reaffirmed in State ex rel. St. Louis County v. Edwards, 589 S.W.2d 283, 288-290 (Mo. banc 1979).

The court in Weinstein held that disputes on budget matters between local circuit courts and county legislative bodies were to be resolved by a petition for review filed in the Supreme Court in which the county would ask the Supreme Court to

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find that the request of the juvenile court was unreasonable. In the absence of such a finding, the county legislative body would be compelled to permit the increased salaries.

Subsequent to the Weinstein decision, the legislature amended Section 50.640 and enacted Section 477.600, RSMo 1986, to provide a mechanism to mediate and resolve these budget disputes. Section 50.640.1, RSMo 1986, provides that the county commission cannot change the budget estimates submitted by the circuit court or the circuit clerk without the consent of the circuit court or the circuit clerk, respectively. Subsection 2 authorizes the county to file a petition for review with a body called the Judicial Finance Commission if the county governing body "deems the estimates of the circuit court to be unreasonable". The circuit court then has the burden of convincing the Judicial Finance Commission that its budget estimate is reasonable.

Section 477.600, RSMo 1986, provides for the creation of the Judicial Finance Commission and sets forth its procedures. The Judicial Finance Commission can accept and adjudicate the petition for review or it can refuse the petition "where the percentage increase of the judicial budget is equal to or less than the percentage increase of the county government budget or where four members of the commission vote to reject consideration of the case." See Section 477.600.6(3), RSMo 1986. Under Section 477.600.7, RSMo 1986, the circuit court or the county governing body, upon receipt of the written opinion of the Commission or upon refusal of the Commission to accept the petition for review, may seek review in the Supreme Court by filing a petition for review with that court within thirty days. If the petition for review is not filed in the Supreme Court, then the recommendation of the Commission shall take effect. If the Commission refuses to review a petition and no petition is filed in the Supreme Court, the circuit court budget is approved as submitted to the county governing body.

The last sentence of Section 1 of Senate Bill No. 622 providing that the compensation above specified amounts shall be approved by both the juvenile court and the governing body of the county has to be interpreted in light of the overriding constitutional principle of the separation of powers as interpreted in the Weinstein and Edwards cases cited above.

The primary rule of statutory construction is to ascertain and give effect to legislative intent. City of Kirkwood v. Allen, 399 S.W.2d 30, 36 (Mo. banc 1966). One guideline in accomplishing this purpose

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is found in the presumption that the legislature is familiar with constitutional requirements so that "when the words used permit a reasonable construction consistent with the obvious legislative intent and within constitutional limitations, a construction leading to invalidity should be avoided." Id.


Aro Systems, Inc. v. Supervisor of Liquor Control, 684 S.W.2d 504, 507-508 (Mo.App. 1984).

In order to avoid an interpretation which would render the last sentence in Section 1 unconstitutional, that section must be interpreted to mean that the governing body of the city or county may "approve" the increased compensation if it agrees with the reasonableness of the request. To interpret the provision to mean that the governing body of the city or county can deny or lessen the request without getting the consent of the circuit court or without utilizing the Judicial Finance Commission procedure would be to render it unconstitutional in light of the Weinstein and Edwards cases cited above.

CONCLUSION

It is the opinion of this office that when a juvenile court, pursuant to Section 1 of House Substitute for Senate Committee Substitute for Senate Bill No. 622, 84th General Assembly, Second Regular Session (1988) determines that its juvenile court personnel should be paid more than the state compensation provided in Section 211.381, RSMo 1986, and the county commission disagrees with the juvenile court's determination of the reasonableness of the additional compensation, the county must either provide for the payment of the additional compensation, obtain the consent of the circuit court to change or disapprove the request, or file a petition for review with the Judicial Finance Commission in accordance with Sections 50.640 and 477.600, RSMo 1986.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General

DEPARTMENT OF HEALTH: A private physician who, for
DIVISION OF FAMILY SERVICES: compensation, furnishes medical
EMPLOYEES: consultant services to a
HEALTH, BOARD OF: facility of the Division of
SOCIAL SERVICES, DEPARTMENT OF: Family Services for three or
STATE EMPLOYEES: four hours a week is "holding
any other . . . employment under
the state of Missouri" within the meaning of Section 191.400,
RSMo 1986.

November 21, 1988

OPINION NO. 189-88

The Honorable J. B. Banks
Senator, District 5
State Capitol Building, Room 323
Jefferson City, Missouri 65109

Dear Senator Banks:

This opinion is in response to your question asking:

Is a private physician who furnishes
medical services to a facility of the
Division of Family Services for four hours
a week "holding any other office or
employment under the state of Missouri"
within the meaning of section 191.400, RSMo
1986?

The statute which you cite establishes the State Board of
Health which consists of seven members appointed by the Governor
with the advice and consent of the Senate. Subsection 1 of
Section 191.400, RSMo 1986, provides in part:

"No member of the state board of health
shall hold any other office or employment
under the state of Missouri."

According to information we have been provided, the
situation which your opinion request addresses is one in which
the physician in question has consulted since the early 1960s
for approximately three or four hours per week with the Division
of Family Services personnel, assisting them in disability
determinations on permanent total disability programs,
supplemental security income programs, and aid to families with
dependent children. The Division pays the physician as a
part-time unclassified employee.¹ The question is whether

The Honorable J. B. Banks

this relationship constitutes "holding any other office or employment under the state of Missouri."

Since the Division of Family Services is an agency of the state of Missouri, Section 660.010.3, RSMo 1986, it is evident that, if the physician's relationship can be characterized as holding "office" or "employment", there is a violation of Section 191.400.1.

The words "office or employment" when used to refer to government service have a very broad meaning. The legislature used both "office" and "employment" because there is a distinction in government service between the two. An officer has duties involving in some part the independent exercise of the sovereign power while an employee's duties do not. State ex rel. Hull v. Gray, 91 Mo.App. 438, 443-445 (K.C. Ct.App. 1902) (city hall engineer was an employee of the city, not a public officer); Aslin v. Stoddard County, 341 Mo. 138, 106 S.W.2d 472, 475 (1937) (janitor of county court house was employee, not a public officer); and State ex rel. Scobee v. Meriwether, 355 Mo. 1217, 200 S.W.2d 340, 342-343 (Mo. banc 1947) (official court reporter was an employee and not a public officer under Article VII, Section 13, Missouri Constitution 1945). As more recently expressed:

"A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer. . . [citation omitted]. That portion of the sovereign's power delegated to the officer must be exercised independently, with some continuity and without control of a superior power other than the law." State ex rel. Eli Lilly and Company v. Gaertner, 619 S.W.2d 761, 764 (Mo.App. 1981).

Under the above authorities, the consulting physician would not be an officer of the state.

It is not necessary to decide whether the physician-consultant is an employee under the common law test² or is an independent contractor since the term "employment" includes not

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only the common law employee relationship but also the rendering of services for another or the transacting of one's own business. State v. Canton, 43 Mo. 48, 51 (1868). The term, therefore, includes a "profession followed or practiced independently". Clark v. Dunham, 179 S.W. 795, 797 (K.C. Ct.App. 1915). In that case, the court held that the term "employment" (as used in a petition for damages by a plaintiff suffering personal injuries at the hand of the defendant and who claimed he had lost wages in his "employment") included the practice of dentistry whether practiced independently or as a paid assistant to another. This office, when interpreting the term "employment" in Article III, Section 12, Missouri Constitution 1945 ("No person holding any . . . employment under . . . , this state or any municipality thereof shall hold the office of senator or representative.") has held that the term includes the rendering of legal services by an attorney in private practice under contract to a governmental entity. See Opinion Letter No. 355, Salveter, 1969 and Opinion No. 13-87, a copy of each is enclosed.

The phrase "holding any other office or employment" has, therefore, a broad meaning including not only state officers but also those who render professional services to the state for compensation whether those services are rendered as a common law employee or as an independent contractor.

CONCLUSION

It is the opinion of this office that a private physician who, for compensation, furnishes medical consultant services to a facility of the Division of Family Services for three or four hours a week is "holding any other . . . employment under the state of Missouri" within the meaning of Section 191.400, RSMo 1986.

Very truly yours,


WILLIAM L. WEBSTER
Attorney General

Enclosures: Opinion Letter No. 355, Salveter, 1969
Opinion No. 13-87

The Honorable J. B. Banks

1. The "unclassified" status is pursuant to the rule promulgated by the Personnel Division of the Office of Administration, 1 CSR 20-1.040(2).

2. As held by the court in Davis v. Human Development Corporation, 705 S.W.2d 540, 542 (Mo.App. 1985): "We are not convinced by respondent's argument that appellant was an employee of HDC, which argument is based solely on the fact that appellant was paid out of the indirect cost budget of HDC. The determination of whether someone is an employee is generally based on who exercises the 'right of control.' This right is affected by such things as the 'extent of control, actual exercise of control, duration of employment, right to discharge, method of payment for services, furnishing of equipment, whether the work is part of the regular business of the employer, and the contract of employment, none of which is in itself controlling, but each may be considered relevant to the issue." Howard v. Winebrenner, 499 S.W.2d 389, 395 (Mo. 1973) (Emphasis added.) "

BUS OPERATOR'S LICENSE:
BUS TRANSPORTATION FOR
PUBLIC SCHOOLS:
ELEMENTARY AND SECONDARY
EDUCATION, DEPT. OF:
DEPARTMENT OF REVENUE:
SCHOOLS:
SCHOOL TRANSPORTATION:

1. In a first or second class county or in a third or fourth class county whose board of education has adopted written compliance with Section 302.272, RSMo Supp. 1988, Section 167.242, RSMo Supp. 1988 exempts an individual transporting four or fewer students in a privately owned automobile from being licensed as a school bus operator or as a chauffeur while under contract to transport with a public school or the State Board of Education. 2. There is no requirement under Section 167.242 that the operator be paid compensation for the exemption to be applicable but the operator must have a legally valid contract to transport. 3. A public school district employee's contract would be considered a "contract to transport" under Section 167.242 only if it contained an express provision regarding the employee's responsibilities to transport school children. 4. In a first or second class county or in a third or fourth class county whose board of education has adopted written compliance with Section 302.272, Section 167.242 does not exempt an individual transporting four or fewer students in an automobile owned by the school district from being licensed as a school bus operator because the exemption applies only to automobiles which are privately, not publicly, owned; therefore, the operator would be required to obtain a school bus operator's permit.

December 22, 1988

OPINION NO. 193-88

Robert E. Bartman
Commissioner of Education
Department of Elementary and Secondary Education
Jefferson State Office Building, Sixth Floor
Jefferson City, Missouri 65101

Dear Commissioner Bartman:

This opinion is in response to your questions asking:

1. In a first or second class county or in a third or fourth class county whose Board of Education has adopted written compliance with Section 302.272, RSMo Supp. 1988, does Section 167.242, RSMo Supp. 1988 exempt an individual transporting four or fewer students in a privately owned vehicle

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from being licensed as a school bus operator or as a chauffeur while under contract with a public school or the State Board of Education?

2. Does compensation for transportation service alter the answer to question number 1?
3. In reference to question number 1, would a public school district employee's contract be considered as a "contract to transport"?
4. If the vehicle in question number 1 is owned by a public school district, would the vehicle be considered a school bus and does the operator need a school bus operator's permit or chauffeur's license?

Section 167.242, RSMo Supp. 1988 provides:

167.242. Chauffeur's license not required to transport pupils, when.--No person operating a private automobile transporting four or fewer students to or from school in accordance with subsection 1 of section 304.060, RSMo, shall be required to be licensed as a chauffeur or a school bus operator while under contract to transport.

A copy of Section 302.272, RSMo Supp. 1988 is attached hereto as Appendix I.

QUESTION 1

1. In a first or second class county or in a third or fourth class county whose Board of Education has adopted written compliance with Section 302.272, RSMo Supp. 1988, does Section 167.242, RSMo Supp. 1988 exempt an individual transporting four or fewer students in a privately owned vehicle from being licensed as a school bus operator or as a chauffeur while under contract with a

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public school or the State Board of
Education?

Subsection (15) of Section 302.010, RSMo Supp. 1988 defines "school bus" for purposes of Sections 302.010 to 302.540 as follows:

302.010. Definitions.--When used in sections 302.010 to 302.540 the following words and phrases mean:

* * *

(15) The term "school bus", when used in sections 302.010 to 302.340, means any motor vehicle, either publicly or privately owned, used to transport students to and from school, or to transport pupils properly chaperoned to and from any place within the state for educational purposes. The term "school bus" shall not include a bus operated by a public utility, municipal corporation or common carrier authorized to conduct local or interstate transportation of passengers when such bus is not traveling a specific school bus route but is:

(a) On a regularly scheduled route for the transportation of fare paying passengers; or

(b) Furnishing charter service for the transportation of persons enrolled as students on field trips or other special trips or in connection with other special events;

If the vehicle is a school bus under subsection (15) of Section 302.010, the operator must have a permit as required by Section 302.272.1, which provides:

1. No person shall operate any school bus owned by or under contract with a public school or the state board of education unless such driver has qualified for a school bus operator's permit under this section and complied with the pertinent rules and regulations of the department of

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revenue. A school bus operator's permit shall be issued to any applicant who meets the following qualifications: . . .

If the vehicle is not a school bus, the operator must still have a school bus operator's permit since Section 302.272 is made applicable to non-school bus vehicles by the second sentence of Section 304.060.1, RSMo Supp. 1988, which second sentence provides:

The state board of education may adopt rules and regulations governing the use of other vehicles owned by a district or operated under contract with any school district in this state and used for the purpose of transporting school children, but except for common carriers, such other vehicles shall not transport more than four school children at any one time and the operator shall be licensed in accordance with section 302.272, RSMo.

A copy of Section 304.060 is attached hereto as Appendix II.

If the vehicle being used is a privately owned automobile, regardless of whether it is a "school bus" within the meaning of Section 302.010(15) and despite the second sentence of Section 304.060.1, the person operating it is exempt by Section 167.242 from having to be licensed as a chauffeur or as a school bus operator if the other requirements of Section 167.242 are met.

No person operating a private automobile transporting four or fewer students to or from school in accordance with subsection 1 of section 304.060, RSMo, shall be required to be licensed as a chauffeur or a school bus operator while under contract to transport. Section 167.242, RSMo Supp. 1988.

However, the operator must comply with any other requirements set forth in the administrative rules of the Department of Elementary and Secondary Education promulgated pursuant to Section 304.060.1.

One of the problems with the exception provided by Section 167.242 is that the term "private automobile" is not defined or described. For instance, does "private automobile" include station wagons, pickup trucks, conversion vans, campers or other recreational vehicles. Since Section 167.242 is an exception to

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the provisions of Section 304.060.1 and since the latter section grants the State Board of Education the authority to promulgate administrative rules concerning these matters, it is most appropriate for the definition of that term to be supplied by those rules. State ex rel. Smithco Transport Company v. Public Service Commission, 377 S.W.2d 361, 377 (K.C. Ct.App. 1957), and State ex rel. Kirkpatrick v. Board of Election Commissioners of St. Louis County, 686 S.W.2d 888, 895 (Mo.App. 1985).

QUESTION 2

2. Does compensation for transportation service alter the answer to question number 1?

Compensation as such is not a requirement. Section 167.242 requires only that there exist a "contract" to transport to which the operator is a party. Therefore, all the legal requirements for a contract must be met.

QUESTION 3

3. In reference to question number 1, would a public school district employee's contract be considered as a "contract to transport"?

We understand this question to refer to employment contracts of school administrators and teachers which do not contain an express reference to that employee having a duty to transport school children. The usual examples given us illustrating the problem include athletic coaches driving students to school athletic events or teachers taking students to or from field trips or other school related activities.

There is no statutory definition of the phrase "under contract to transport." The plain meaning of those words is a contract whose purpose is to provide transportation for school children. Ordinarily, this would be one which has an express reference to transporting school children although the contract need not be exclusively or even primarily for that purpose.

In support of this interpretation, it is significant that a closely related statute, Section 304.060, RSMo Supp. 1988, utilizes the phrase "under contract" to refer to transportation contracts on school buses and other vehicles used to transport school children:

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The state board of education shall adopt and enforce regulations not inconsistent with law to cover the design and operation of all school buses used for the transportation of school children when owned and operated by any school district or privately owned and operated under contract with any school district in this state, and such regulations shall by reference be made a part of any such contract with a school district. The state board of education may adopt rules and regulations governing the use of other vehicles owned by a district or operated under contract with any school district in this state and used for the purpose of transporting school children, but except for common carriers, such other vehicles shall not transport more than four school children at any one time and the operator shall be licensed in accordance with section 302.272, RSMo. . . . [Emphasis added.] Section 304.060.1, RSMo Supp. 1988.

However, in the fourth sentence of that same subsection, the legislature indicates its intent to refer to employment contracts by means of express language:

Every school district, its officers and employees, and every person employed under contract by a school district shall be subject to such regulations. [Emphasis added.]

This demonstrates that when the legislature intends to refer to employment contracts in the context of operating transportation vehicles for school children, it does so explicitly.

Other factors tending to support the conclusion that the phrase "under contract to transport" includes only contracts which have transportation of students as an express provision therein are found in the legislative history of Section 167.242 and the purpose behind Senate Bill No. 114, 84th General Assembly, First Regular Session (1987), in which Section 167.242 and other relevant sections were amended. The amendment changed Section 167.242 as follows with omitted material in brackets and new material underlined:

No person operating a private automobile transporting four or fewer students to or

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from school in accordance with section 304.060(1), RSMo, shall be required to be licensed as a chauffeur or a school bus operator [to transport his or her child, stepchild or ward to or from school] while under contract to transport. Section 167.242, RSMo Supp. 1988 (Laws of Missouri, 1987, page 724 at 725).

As originally enacted in 1977 by House Bill No. 130, 79th General Assembly, First Regular Session (Laws of Missouri, 1977, page 331 at 353), Section 167.242 was intended to provide for those situations in which a school district could not provide free transportation to a handicapped child to get to school because the district did not have the requisite equipment on its school buses to accommodate the child. Normally, the parent or guardian did have a properly equipped motor vehicle so the district would contract with them to transport the child. As originally enacted, Section 167.242 exempted those parents or guardians from having to get a chauffeur's license.

In view of this, the use of the term "under contract to transport" in the original Section 167.242 clearly referred to contracts with an express provision for transportation. The retention of this phrase after the 1987 amendment tends to show that the legislature meant to keep that same meaning.

Furthermore, the evident purpose of Senate Bill No. 114 was to make for stricter requirements on school bus operators. Sections 302.051 and 302.070, RSMo 1986, were amended in that same bill to add to the requirements of school bus operators in districts exempted under subsection 7 of Section 302.272 that they possess a chauffeur's license and be at least eighteen years of age. The provisions added by the 1987 amendment are underlined:

Any person holding a valid operator's license shall not be required to procure a chauffeur's license for the operation for official use of any motor vehicle owned by the United States, the state of Missouri, or by any municipality or political subdivision of this state, except that a person shall be required to procure a chauffeur's license to operate a school bus for a school district whose central administrative offices are located in a county of the third or fourth class and whose board of education has not elected to comply with the

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requirements of section 302.272. Section 302.051, RSMo Supp. 1988 (Laws of Missouri, 1987, page 724 at 726).

No person who is under the age of twenty-one years shall drive any motor vehicle while in use as a public or common carrier of persons or property until he has been licensed as a chauffeur, except that drivers of trucks of less than one ton manufacturer's rated capacity may be licensed as a chauffeur if at least eighteen years of age. An operator of a school bus shall be at least eighteen years of age and shall obtain a chauffeur's license unless the school district for whom he operates the school bus complies with the requirements of section 302.272 which requirement shall then apply. Section 302.070, RSMo Supp. 1988 (Laws of Missouri, 1987, page 724 at 726).

Subsection 1 of Section 304.060 was also amended in Senate Bill No. 114 to add, among other things, a sentence giving the State Board of Education authority to promulgate regulations governing the use of authorized common carriers for the transportation of students for specified purposes. See third sentence of subsection 1 of Section 304.060, RSMo Supp. 1988 (Laws of Missouri, 1987, page 724 at 727).

Since the purpose of the above-described amendments in Senate Bill No. 114 was to make stricter the requirements of drivers of vehicles transporting school children, then an exception such as Section 167.242 should be construed narrowly with the phrase "under contract to transport" being restricted to contracts which have an express provision therein for the transportation of school children and not being extended to employment contracts which only incidentally or impliedly impose the duty to transport school children.

In answer to Question 3, a school district employee's contract is a "contract to transport" under Section 167.242, RSMo Supp. 1988, only when that contract contains an express provision imposing upon the employee the duty to transport school children.

QUESTION 4

4. If the vehicle in question number 1 is owned by a public school district,

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would the vehicle be considered a school bus and does the operator need a school bus operator's permit or chauffeur's license?

As question 1 is modified by question 4, it reads as follows:

In a first or second class county or in a third or fourth class county whose Board of Education has adopted written compliance with Section 302.272, RSMo Supp. 1988, does Section 167.242, RSMo Supp. 1988 exempt an individual transporting four or fewer students in a vehicle owned by the school district from being licensed as a school bus operator or as a chauffeur while under contract with a public school or the State Board of Education?

According to the terms of Section 302.010(15), whether the vehicle is owned privately or by the school district does not affect the determination as to whether it is a school bus. That determination depends on how the vehicle is used:

. . . any motor vehicle, either publicly or privately owned, used to transport students to and from school, or to transport pupils properly chaperoned to and from any place within the state for educational purposes." Section 302.010(15), RSMo Supp. 1988.

Whether the vehicle is a school bus or not, a school bus operator's permit under Section 302.272 is required of the operator in either instance. If the vehicle is owned by the school district and comes within the definition of "school bus" in subsection (15) of Section 302.010, the operator would have to have a school bus operator's permit under Section 302.272. The exception for privately owned automobiles in Section 167.242 does not apply here because a vehicle owned by a school district is publicly, not privately, owned. School District of Oakland v. School District of Joplin, 340 Mo. 779, 102 S.W.2d 909, 910 (1937). If the vehicle is a vehicle other than a school bus, under the second sentence of Section 304.060.1, the operator would have to have a school bus operator's permit as explicitly provided in that sentence (" . . . the operator shall be licensed in accordance with Section 302.272, RSMo").

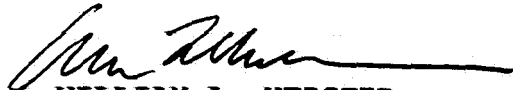
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CONCLUSION

It is the opinion of this office that:

1. In a first or second class county or in a third or fourth class county whose board of education has adopted written compliance with Section 302.272, RSMo Supp. 1988, Section 167.242, RSMo Supp. 1988 exempts an individual transporting four or fewer students in a privately owned automobile from being licensed as a school bus operator or as a chauffeur while under contract to transport with a public school or the State Board of Education.
2. There is no requirement under Section 167.242 that the operator be paid compensation for the exemption to be applicable but the operator must have a legally valid contract to transport.
3. A public school district employee's contract would be considered a "contract to transport" under Section 167.242 only if it contained an express provision regarding the employee's responsibilities to transport school children.
4. In a first or second class county or in a third or fourth class county whose board of education has adopted written compliance with Section 302.272, Section 167.242 does not exempt an individual transporting four or fewer students in an automobile owned by the school district from being licensed as a school bus operator because the exemption applies only to automobiles which are privately, not publicly, owned; therefore, the operator would be required to obtain a school bus operator's permit.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

APPENDIX I

302.272. School bus operator's permit. qualifications—classification of buses—permit renewal, when, requirements—fee—temporary permits—grounds for refusal to issue or renew permit—criminal record checks of applicants—provisions of this section to be optional in districts in certain counties.—

1. No person shall operate any school bus owned by or under contract with a public school or the state board of education unless such driver has qualified for a school bus operator's permit under this section and complied with the pertinent rules and regulations of the department of revenue. A school bus operator's permit shall be issued to any applicant who meets the following qualifications:

(1) The applicant has a valid state operator's license or chauffeur's license issued under this chapter or has an operator's license or chauffeur's license valid in any other state;

(2) The applicant shall be at least twenty-one years of age and not over seventy years of age;

(3) The applicant shall have passed a medical examination, including vision and hearing tests, as prescribed by the director of revenue; and

(4) The applicant shall have successfully passed an examination for the operation of a school bus as prescribed by the director of revenue. The examination shall include, but need not be limited to, a written skills examination of applicable laws, rules and procedures, and a driving test in the type of vehicle to be operated. The test shall be completed in the appropriate class of vehicle to be driven. For purposes of this section school buses will be classified as:

(a) Class A—those capable of transporting twenty-four or more passengers; and

(b) Class B—those capable of transporting fewer than twenty-four passengers.

Any person successfully passing an examination for the operation of a class A bus shall be deemed eligible to operate a class B bus.

2. A school bus operator's permit shall be renewed every three years and shall require the applicant to provide a medical examination as specified in subdivision (3) of subsection 1 of this section and to successfully pass a written skills examination as prescribed by the director of revenue in consultation with the department of elementary and secondary education. The director may waive the written skills examination on renewal of a school bus operator's permit upon verification of the applicant's successful completion within the preceding twelve months of a training program which has been approved by the director in consultation with the department of elementary and secondary education and which is at least eight hours in duration with special instruction in school bus driving.

3. The fee for a new or renewed school bus operator's permit shall be three dollars.

4. Upon the applicant's completion of the requirements of subsections 1, 2 and 3 of this section, the director of revenue shall issue a temporary school bus operator's permit to the applicant until such time as a permanent school bus operator's permit shall be issued following the record clearance as provided in subsection 6 of this section.

5. The director of revenue, to the best of his knowledge, shall not issue or renew a school bus operator's permit to any applicant:

(1) Whose driving record shows that such applicant's privilege to operate a motor vehicle has been suspended or revoked or whose driving record shows a history of moving vehicle violations;

(2) Who has been convicted of any felony for an offense against the person as defined by chapter 565, RSMo; of any misdemeanor or felony for a sexual offense as defined by chapter 566, RSMo; of any misdemeanor or felony for prostitution as defined by chapter 567, RSMo; of any misdemeanor or felony for an offense against the family as defined in chapter 568, RSMo; of any misdemeanor or felony for pornography or related offense as defined by chapter 573, RSMo; or of any similar crime in any federal, state, municipal or other court of similar jurisdiction of which he has knowledge;

(3) Who has been convicted of any felony involving robbery, arson, burglary or a related offense as defined by chapter 569, RSMo; any felony or misdemeanor for violation of drug regulations as defined in chapter 195, RSMo; or any similar crime in any federal, state, municipal or other court of similar jurisdiction within the preceding ten years of which he has knowledge.

6. The department of social services or the Missouri highway patrol, whichever has access to applicable records, shall provide a record of clearance or denial of clearance for any applicant for a school bus operator's permit for the convictions specified in subdivisions (2) and (3) of subsection 5 of this section. The department of social services or the Missouri highway patrol shall provide the record of clearance or denial of clearance within thirty days of the date requested, relying on information available at that time; provided, however, that the department of social services or the Missouri highway patrol shall provide any information subsequently discovered to the department of revenue.

7. Compliance with subsections 1 through 6 of this section shall be optional for school districts whose central administrative offices are located in counties of the third or fourth class. No school bus operator employed by such school district shall be required to comply with the provisions of subsections 1 through 6 of this section unless the board of education elects by written record to adopt compliance with this section.

(L. 1986 S.B. 707 § 302.270, A.L. 1987 H.B. 384 Revision and S.B. 3)

Effective 9-1-88

APPENDIX II

304.060. School buses and other district vehicles, use to be regulated by board—field trips in common carriers regulation authorized—violation by employee, effect—design of school buses, regulated by board—St. Louis County buses may use word "special".—

1. The state board of education shall adopt and enforce regulations not inconsistent with law to cover the design and operation of all school buses used for the transportation of school children when owned and operated by any school district or privately owned and operated under contract with any school district in this state, and such regulations shall by reference be made a part of any such contract with a school district. The state board of education may adopt rules and regulations governing the use of other vehicles owned by a district or operated under contract with any school district in this state and used for the purpose of transporting school children, but except for common carriers, such other vehicles shall not transport more than four school children at any one time and the operator shall be licensed in accordance with section 302.272, RSMo. The state board of education may also adopt rules and regulations governing the use of authorized common carriers for the transportation of students on field trips or other special trips for educational purposes.

Every school district, its officers and employees, and every person employed under contract by a school district shall be subject to such regulations. The state board of education shall cooperate with the state highways and transportation department and the state highway patrol in placing suitable warning signs at intervals on the highways of the state.

2. Any officer or employee of any school district who violates any of the regulations or fails to include obligation to comply with such regulations in any contract executed by him on behalf of a school district shall be guilty of misconduct and subject to removal from office or employment. Any person operating a school bus under contract with a school district who fails to comply with any such regulations shall be guilty of breach of contract and such contract shall be canceled after notice and hearing by the responsible officers of such school district.

3. Any other provision of the law to the contrary notwithstanding, in any county of the first class with a charter form of government adjoining a city not within a county school buses may bear the word "special".

(L. 1949 p. 329 § 2, A.L. 1977 H.B. 130, A.L. 1987 S.B. 114)

Effective 6-19-87